Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

HIGH RIDGE ASSOCIATION, INC.,

Petitioner,

v.

AARON E. GREEN AND RUTH E. GREEN,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WAS THE DECISION OF THE BOARD OF COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND TO CONDEMN PETITIONER'S PROPERTY AN UNCONSTITUTIONAL, UNLAWFUL GRANT OF A PRIVATE REMEDY FOR THE SOLE BENEFIT AND ECONOMIC ADVANTAGE OF A SINGLE PROPERTY OWNER, AND NOT FOR A PUBLIC PURPOSE OR BENEFIT CONTRARY TO ESTABLISHED PRINCIPLES OF MARYLAND AND FEDERAL CONSTITUTIONAL LAW?

II. DID THE INTERMEDIATE APPELLATE COURT ERR BY ALLOWING RESPONDENTS AS PRIVATE CITIZENS TO PERMISSIVELY INTERVENE IN CONDEMNATION PROCEEDINGS FOLLOWING THE DECISION OF THE BOARD OF COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND TO ABANDON THESE CONDEMNATION PROCEEDINGS AGAINST PETITIONER?

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JURISDICTION FOR CERTIORARI

On June 6, 1997 the Court of Appeals of Maryland issued its opinion in the case of *Aaron E. Green and Ruth E. Green v. High Ridge Association, Inc.*, 346 Md. 65, 695 A.2d 125 (1997). On July 23, 1997 the Court of Appeals of Maryland issued its Order denying the Petitioner's request for reconsideration of its opinion and on the same date issued its Mandate in that case.

The Petition seeks a Writ of Certiorari to review the State Court of last resort's decision on an important Federal question which conflicts with decisions of other State Courts, with decisions of United States Courts of Appeal and also with relevant decisions of this Court and should be settled by this Court pursuant to jurisdiction conferred by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND PROCEDURAL RULE INVOLVED

U.S. CONSTITUTION

[AMENDMENT V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[AMENDMENT XIV]

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MARYLAND CONSTITUTION:

Article III

Section 40. Eminent domain.

The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.

MARYLAND CONSTITUTION, DECLARATION OF RIGHTS

Article 24. Due process.

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

MARYLAND RULES OF PROCEDURE

Md. Rule 2-214. INTERVENTION

(a) Of Right. – Upon timely motion, a person shall be permitted to intervene in an action: (1) when the person has an unconditional right to intervene as a matter of law; or (2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede

the ability to protect that interest unless it is adequately represented by existing parties.

(b) permissive. –

(1) *Generally.* – Upon timely motion a person may be permitted to intervene in an action when the person's claim or defense has a question of law or fact in common with the action.

(2) *Governmental Interest.* – Upon timely motion the federal government, the State, a political subdivision of the State, or any officer or agency of any of them may be permitted to intervene in an action when the validity of a constitutional provision, charter provision, statute, ordinance, regulation, executive order, requirement, or agreement affecting the moving party is drawn in question in the action, or when a party to an action relies for ground of claim or defense on such constitutional provision, charter provision, statute, ordinance, regulation, executive order, requirement, or agreement.

(3) *Considerations.* – In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. – A person desiring to intervene shall file and serve a motion to intervene. The motion shall state the grounds therefor and shall be accompanied by a copy of the proposed pleading setting forth the claim or defense for which intervention is sought. An order granting intervention shall designate the intervenor as a plaintiff or a defendant. Thereupon, the intervenor shall promptly file the pleading and serve it upon all parties.

STATEMENT OF THE CASE

On February 27, 1992, the County Commissioners of Carroll County, Maryland (hereinafter "Commissioners"), voted two to one to condemn a portion of the property of Petitioner, High Ridge Association, Inc. (hereinafter "Association"), enabling adjoining property owners, Respondents, Aaron E. Green and Ruth E. Green (hereinafter collectively "Green"), to create an additional public road access to develop their land with residential lots. (App. F-1).

On July 27, 1992 the Commissioners sued the Association in the Circuit Court for Carroll County, Maryland to condemn the Association's land. On November 17, 1992 the Circuit Court granted the Association's Motion for a separate trial on issues of law regarding the Commissioners' authority to condemn the Association's property under U.S. Constitution, Amendments V and XIV and Art. III; Sec. 40 Md. Const. and reserving trial of remaining issues until a later date. The Association challenged the taking *inter alia* on grounds that it was constitutionally unsound since it was for the purely private purpose of providing a private remedy to a private citizen at the request of that private citizen for a more convenient and profitable roadway access and was not for a public purpose as required by both the Federal and Maryland constitutions.

On December 2, 1992 trial was held on the issues of the Commissioners' right to condemn. Both parties presented documentary evidence and witness testimony and the Court instructed the parties to submit written memoranda of law and argument.

On December 16, 1993 the Circuit Court entered its Memorandum Opinion and Order finding in favor of the Commissioners on the issue of the Commissioners' right to condemn the Association's property. (App. B-1 – B-11).

On June 28, 1994 the Commissioners and the Association appeared in the Circuit Court for hearing on the issue of damages. A stipulation of fair market value was submitted to the Circuit Court upon which the Court entered an inquisition judgment in favor of the Commissioners.

A timely appeal was noted to the Court of Special Appeals by the Association.

On February 17, 1995 the Commissioners and Association entered a Conciliation Agreement whereby the condemnation litigation between those parties would terminate with the Commissioners abandoning the condemnation and the Association being fully restored to its lawful ownership of the property. (App. G-1 – G-4). The Commissioners filed an Election to Abandon with the Court of Special Appeals on or about February 21, 1995.

Green filed a Motion to Intervene and proposed Motion to Strike Election to Abandon on or about February 27, 1995. The Commissioners and Association filed a Joint Suggestion of Mootness on or about March 6, 1995. By its Order of March 24, 1995, the Court of Special Appeals denied Green's Motion to Intervene as of right, struck the Election to Abandon and Joint Suggestion of Mootness on its own motion and reserved ruling on Green's request for permissive intervention.

On May 8, 1995, the Court of Special Appeals granted Green's Renewal of Motion to Intervene permitting Green to intervene permissively, to file a brief and participate as Appellees.

On June 29, 1995 the Court of Special Appeals reversed the Circuit Court's judgment in favor of the Commissioners. The Court of Special Appeals found that there was no evidence of record upon which any rational inference of a public purpose for the condemnation could be founded, that the record was replete with evidence to demonstrate that the condemnation was undertaken solely for the private benefit of Green and that the decision to condemn was intended as Green's private remedy. *High Ridge Association, Inc. v. County Commissioners of Carroll County*, 105 Md. App. 423, 660 A.2d 951 (1995). (App. C-1 – C-17).

The Court of Appeals of Maryland granted Green's Petition for Writ of Certiorari and denied the Association's Cross-Petition for Writ of Certiorari challenging, *inter alia*, the propriety of Green's intervention on December 19, 1995.

The Court of Appeals of Maryland issued its opinion in *Aaron E. Green and Ruth E. Green v. High Ridge Association, Inc.*, 346 Md. 65, 695 A.2d 125 (1997) on June 6, 1997. (App. A-1 – A-19). On or about July 1, 1997, Association filed a Motion with the Court of Appeals for reconsideration of their opinion. On July 23, 1997 the Court of Appeals denied the Association's Motion for Reconsideration and issued its Mandate in this case. (App. D-1).

ARGUMENT

INTRODUCTION

When the Court of Appeals of Maryland sustained the aborted efforts of Carroll County government to condemn a portion of the Association's property, they accepted at face value the bald claim that the purpose of the taking was for a public road and as such satisfied the "public use" requirements of the Federal and Maryland Constitutions for the exercise of eminent domain. They did so even though County government had decided more than a year earlier that it was not appropriate to pursue acquisition of the Association's land through condemnation and intended to restore the subject property to the Association's unencumbered, peaceful ownership. They did so not at the request of local government, but only because the only private citizen who could conceivably benefit from the condemnation was allowed to participate through permissive intervention as a party/condemnor in the appellate courts.

In so doing, the Court of Appeals failed to conduct any actual scrutiny of the evidentiary record to evaluate what the true purpose of the condemnation really was.

By averting their concern from discerning the "purpose" of the condemnation and focusing on the label of public use concocted after the decision to condemn was made, the Court of Appeals has elevated form over the substance of the true motivation and purpose for that taking which, as the Court of Special Appeals so quickly and easily discovered, was simply to allow Green, a private citizen, to usurp, at Green's request, the County's

powers of eminent domain to allow Green to more conveniently and profitably develop their land for private gain than Green could without the taking of Association's property.

The Court of Appeals has deprived the Association of its right under both the Federal and Maryland Constitutions to have this issue of "public use" determined as a judicial question based on an evaluation of the evidentiary record and not on the blind acceptance of the bald assertions of the condemning authority.

A.

STATEMENT OF MATERIAL FACTS

This action involves the aborted efforts of a county government to acquire by *ad hoc* condemnation a portion of the Association's property pursuant to the general statutory authority of ANN. CODE of MD; Real Property Art; Sec. 12-101, et seq., and Maryland Rules of Procedure; Subtitle "U".

From its inception, this action has been the effort of Green to petition that County government to condemn a portion of their neighbor's property which that neighbor would not voluntarily convey to establish a more convenient public road access enabling Green to develop residential lots upon their land less expensively than they would be able to do by using other public roadway access available to them.

Green owns land in Carroll County, Maryland bounded on at least two sides by the High Ridge residential subdivision. Nottingham Road runs north from Md.

Rte. 32 through High Ridge subdivision to the boundary of Green's property. This terminus of Nottingham Road at the boundary allows Green to extend Nottingham Road into their property as access to Rte. 32 for further development of their land. Such an extension of Nottingham Road would not require condemnation of any of Association's property. At trial in the Circuit Court for Carroll County, Ronald E. Bailey, a land planning and design expert, testified that Green's property had other fee simple roadway access in addition to Nottingham Road.

High Ridge Drive runs easterly from Nottingham Road and terminates at a cul-de-sac within the subdivision property some fifteen (15) feet from another common boundary of Green's property. Bailey testified that when the High Ridge subdivision's preliminary plan was approved he was Assistant Director of Carroll County's Planning staff and personally reviewed the subdivision plans for the staff. Bailey testified that High Ridge Drive was intended to terminate within subdivision property and not be extended to the boundary of Green's property due to the presence of a fifteen (15) foot right of way[1] lying along this part of the common boundary in accordance with the practice at that time of avoiding rights-of-way or similar encumbrances in the beds of public

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[1] The fifteen (15) foot wide strip of property between the terminus of High Ridge Drive and Green's property line, running along the common boundary between the Association's and Green's property, was ultimately retained by the developer of the High Ridge subdivision and conveyed to the Association as a pedestrian pathway in the Association's overall open space area.

streets. The property involved in this case is part of that fifteen (15) foot strip owned by Association.

Some time in 1990 or 1991 Green proposed to develop residential lots on his property. Though located in Carroll County's agricultural zone, regulations permit creation of as many as twenty-one (21) individual lots on the Green property. However, Green determined it would be economically advantageous to develop some of these lots by extending High Ridge Drive through the fifteen (15) feet of Association property into Green's property and create lots along an extended High Ridge Drive.

In January, 1991, Green's counsel wrote to the Carroll County Development Review office memorializing an earlier meeting with staff on January 4, 1991. The letter acknowledged Green's access through Nottingham Road, but recognized that developing some of the lots off of an extended High Ridge Drive would be more economically desirable. Green's counsel suggested that there had been some "mistake or apparent error" in terminating High Ridge Drive within subdivision property when that street was originally designed and approved as part of the High Ridge subdivision and suggested eminent domain as a remedy to Green's access problem.

Green discussed his access problem with Donald Dell, then President of the Commissioners and the remaining Commissioners. Testimony at trial in the Circuit Court indicates that Green's counsel requested the use of eminent domain to solve Green's access problem at these meetings although Green acknowledged alternative public road access, but that the alternative access would

require more development work and greater development expense to Green.

Green submitted a concept plan for development of his property off an extended High Ridge Drive which also depicted a significant number of proposed lots on another portion of Green's property served by access other than extended High Ridge Drive. The plan was referred to the planning staff to prepare a report to the Planning & Zoning Commission for the Commission's November 19, 1991, meeting.

The report recounted the practice at the time of approval of the High Ridge subdivision to keep rights-of-way on separate parcels consistent with Bailey's testimony at trial in the Circuit Court. The special report makes no reference to any mistake in not extending High Ridge Drive to Green's property line contrary to the suggestion in Green's counsel's January, 1991, letter. The transcript of the November, 1991, proceedings before the Planning Commission includes no reference by the Planning staff to any alleged error in not originally extending High Ridge Drive to Green's boundary line, also consistent with Bailey's testimony.

The transcript does reveal that Green's counsel suggests this alleged error of not extending High Ridge Drive to Green's boundary at the November 19, 1991, proceedings. Green's counsel argued at length for the final report and recommendation of the Planning Commission to include reference to this alleged error so that the Commissioners would not characterize Green's predicament as a garden variety access problem. The minutes of the November 19, 1991, Planning Commission

proceedings are a verbatim duplication of the Staff's special report with an additional concluding paragraph entitled "Decision" including the language requested by Green's counsel. (App. E-1 – E-4).

Ironically, the *approved* preliminary plan for High Ridge, introduced as evidence at trial in the Circuit Court, clearly indicates High Ridge Drive terminating within the subject property away from Green's property line, consistent with Bailey's testimony.

The Planning Commission minutes were forwarded to the County Commissioners. On February 27, 1992, the Commissioners, by a 2 to 1 vote, Commissioner Lippy dissenting, voted "to condemn such property as necessary to implement the Planning & Zoning Commission recommendation with respect to the construction of a street *to serve the Aaron Green subdivision* which will intersect with an existing cul-de-sac in High Ridge subdivision". (emphasis supplied). The Commissioners' minutes of February 27, 1992, otherwise consists of the concluding paragraphs of the Planning & Zoning Commission's November 19, 1991, minutes. (App. F-1).

The Commissioners' February 27, 1992, minute address only this alleged "error" or "mistake" suggested by Green's counsel as the reason to condemn the Association's property. The minute is completely silent as to any statement of public purpose served by the condemnation. (App. F-1).

Nowhere in the evidentiary record of these proceedings through this chronological period is there any reference to any public purpose to be served or achieved by the condemnation of the Association's property. There is

absolutely no discussion of the need to condemn the subject site for a public road or street or for any other public project or purpose. A review of that record would clearly reveal that the sole reason that the Planning Commission and Commissioners were considering the condemnation of the Association's land was because Green had "petitioned" them to do so to provide a remedy to solve an access problem which Green claimed was the result of an alleged "error" or "mistake" of not running High Ridge Drive to Green's property line when the interior subdivision street was originally designed and approved as part of the High Ridge subdivision project.

The record is devoid of any evidence indicating that the extension of High Ridge Drive requested by Green was a public works project initiated by County government, was being requested by other members of the public or County citizens other than Green or that Green was requesting the condemnation of a portion of the Association's land for the purpose of constructing a public road. In fact Green's stated purpose and objective was not to construct a public road but to privately develop his property into additional residential lots in a more financially favorable manner than he could accomplish by utilizing the existing public road access which his property already enjoyed.

During the pendency of proceedings in the Court of Special Appeals of Maryland, the Commissioners and the Association entered in a "Conciliation Agreement" to "settle" the underlying condemnation case through, *inter alia*, the Commissioners' abandonment of the litigation. (App. G-1 – G-4). Green then sought to intervene in the pending appeal as a party plaintiff/condemnor despite

Green's status as private citizen lacking statutorily delegated authority to exercise the State's power of eminent domain and despite the Commissioners' decision to abort the taking of the disputed property on behalf of the citizens of Carroll County. After repeated requests Green was allowed to intervene permissively during the pendency of this case in the Court of Special Appeals.

B.

1. THE COMMISSIONERS' DECISION TO CONDEMN WAS AN UNCONSTITUTIONAL PRIVATE REMEDY FOR THE SOLE BENEFIT AND ECONOMIC ADVANTAGE OF A SINGLE PROPERTY OWNER AND NOT FOR A PUBLIC PURPOSE.

Only if the purpose of an exercise of eminent domain is public can such action be constitutionally sustained. Art. III; § 40, Md. Const.: U.S. Const.; Amendments V and XIV. "An incidental public benefit will not save an otherwise private taking. [W]here the *predominant purpose or effect* of a particular condemnation action has been to benefit private interest, this Court has held that the taking is not for 'public use' within the meaning of Art. III; § 40, of the Md. Const." (emphasis supplied). *Prince Georges County v. Collington Crossroads, Inc.*, 275 Md. 171 at 188, 339 A.2d 664 (1975). Whether a particular taking is for a public purpose is dependent upon the facts of each case. *Clark v. Nash*, 198 U.S. 361 at 369, 49 L.Ed. 1805, 25 S.Ct. 676 (1905).

This Court has also held that takings of private property for private purposes, even though they may be compensated, violate the implicit requirement of a public

purpose for eminent domain in the "takings" clause of the Fifth Amendment to the U. S. Constitution and also deny the owner of the condemned property the protection of due process of law protected against state action through the Fourteenth Amendment. See *Missouri Pac. Ry. Co. v. State of Nebraska*, 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489 (1896); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 57 S.Ct. 364, 81 L.Ed. 510 (1937).

The Court of Appeals of Maryland failed to focus on the underlying reason or *purpose* for the exercise of eminent domain, but justified exaction of this private remedy by focusing on the allegedly public attributes that an extended High Ridge Drive may subsequently have upon completion of Green's proposed development. The Court of Appeals therefore failed to look at the purpose of condemnation, but focused instead on an isolated, incidental aspect of this private development that would arguably arise only after the project was completed. Such a focus on this subsequent incidental effect of a road Green will be compelled to build by operation of applicable local law as an amenity for these lots, is, idiomatically speaking, the tail wagging the dog and is immaterial to determining whether the *purpose* of the taking is public or private.

Green did not request the County's assistance in exercising eminent domain for the purpose of constructing a public road running to or through the interior of Green's property, but for the purpose of facilitating Green's creation of residential lots to sell on the private market as profitably as possible. What is constitutionally abhorrent about these circumstances is the usurpation of eminent domain to provide an economic windfall to

Green at the expense of another neighbor by physically appropriating that neighbor's land against that neighbor's will. In their February 27, 1992, minute embodying the decision to condemn the Association's property, the County Commissioners fail to indicate what public purpose requires the condemnation and, instead, expressly state that their purpose is to correct the alleged "error" or "mistake" initially suggested to County representatives by Green's counsel. (App. F-1). The Commissioners' action, therefore was obviously intended as a private remedy for Green for a purported mistake which (according to the testimony of the only witness with first-hand knowledge of those facts) never occurred.

Even assuming, *arguendo*, the existence of such an error, it still does not provide the public purpose constitutionally required for condemnation of the Association's property. If anything, an "error" may give Green a *private* right of action against the County but is a constitutionally deficient justification for condemnation.

From evidence developed in the Circuit Court, the following is uncontroverted: there are no existing improvements on the portion of the Green property to be served by extended High Ridge Drive; there are no existing improvements or residences on the Green property whose public road access is presently failing; there are no improvements of any public nature presently planned to be constructed on the Green property (absent those that Green would be compelled to construct in connection with the proposed residential development); no one can recall similar factual circumstances in which Carroll County has attempted to exercise eminent domain; and

no County citizen other than Green or their representatives have requested the Commissioners to condemn the Association's property. Green's property is not within any County planned water and sewer service areas. Similarly, there is no proposal that High Ridge Drive be extended into the Green property as part of either the 1972 or 1981 major street plans for that area of Carroll County.

Significant testimony as to the truly private purpose for the condemnation came from Commissioners Dell and Lippy. Dell testified in the Circuit Court on December 2, 1992, that he felt public funds should be expended to pay for any condemnation damages awarded the Association. However, he indicated that he had only recently adopted that view subsequent to his November 6, 1992 deposition, taken three (3) weeks before trial. Up through the time of his deposition, he believed that it was not appropriate to use public funds but to use Green's funds to pay any damages awarded for condemnation of the subject property and he so testified at the deposition, under oath. In fact, at trial, Dell acknowledged his inconsistent deposition testimony given under oath in the presence of counsel in which he testified, among other things; that Green should pay the costs of any condemnation damages; that it was contrary to his belief that the County purchase a piece of property for a private developer; that he did not feel it was right to take taxpayers' money to compensate a development per se; and, if he were originally aware that public funds were to be expended as damages, he probably would not have voted for condemnation in the first place.

Not only did Dell admit this inconsistent deposition testimony, at trial he made no effort to explain the inconsistencies during examination by Association's counsel nor was there any attempt to rehabilitate his testimony by the Commissioners' counsel. The Association submits that Dell's prior deposition testimony is more reliable as evidence of whether Dell considered the condemnation a public acquisition or private remedy for Green at the crucial point in time when the election was made to condemn.

The Commissioners' vote to condemn was not unanimous. Commissioner Lippy testified that he felt the matter was a private one between Green and the Association and was particularly repulsed by the notion of condemnation in this case because it was, in his opinion, for the benefit of a single resident of Carroll County, Green, and not the public as a whole.

Although some deference is to be accorded to the decision of a condemning authority upon review of their decision to condemn, the Courts almost universally recognize that the issue of "public use" is a judicial question to be resolved by the Courts. "There seems to be a general concurrence of opinion that Courts must determine whether the use for which a citizen's property is taken be public or private. It is held by the Supreme Court of the United States. *Shoemaker v. United States*, 147 U.S. 298", *Van Witsen, et al. v. Gutman*, 79 Md. 405 at 410, 29 Atl. 608 (1894). Also,

> "All the authorities hold that whether a use is public or private, is a question not for the Legislature, but for the Judiciary. (citations deleted). The Legislature cannot make a particular use,

> either public or private, merely by so declaring it. If it could do so the constitutional restraint would be utterly nugatory." *Arnsberger v. Crawford*, 101 Md. 247 at 252, 61 Atl. 413 (1905).

Even recent decisions of this Court which have broadly interpreted public use for takings pursuant to social legislation such as land reform and urban renewal acts have recognized the obligation of Courts to consider whether the purpose for condemnation is truly public or not. See, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 104 S.Ct. 3321, 81 L.Ed.2d 186 (1984), *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27 (1954). However, the condemnation involved in the case *sub judice* is not being undertaken pursuant to broad social legislation but is instead an *ad hoc* determination with respect to a single parcel of land undertaken at the request of Green. This Court has recently determined that in the context of regulatory takings analysis such an *ad hoc* decision is not entitled to the same deference as legislative enactments having a jurisdiction-wide effect, *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994), and in so doing announced a different or "rough proportionality" scrutiny which is less deferential than the "rational basis" test applicable to legislative enactments when evaluating whether regulation of property interests constitute a taking of the owner's land.

The decision of the Court of Appeals of Maryland is inconsistent with the decisions of other state courts. Circumstances of the case *sub judice* most closely resemble those of *Brannen v. Bullock County*, 387 S.E. 395, 397-398 (1989) where the Court of Appeals of Georgia reversed a local court's authorization of a taking of land to construct

a road for the convenience of a single citizen when other alternatives to that proposed road were available, without condemnation, although they were more expensive and less convenient to the private citizen who requested the condemnation. Similarly to the case *sub judice*, the record in *Brannen, supra*, included testimony of a County Commissioner that he had been approached by the owner of the benefitted land and that the Commission would not have voted to condemn but for the benefitted citizen's promise to cover all expenses of the condemnation. *ibid*, 387 S.E.2d at 397. See also, *Department of Highways v. Denver and Rio Grande Western Railroad Company*, 757 P.2d 181 at 183 (Colo. App. 1988) (affirmed on other grounds, 789 P.2d 1088 (Colo. Sup. Ct. 1990)).

Unlike the Court of Appeals of Maryland, the Court of Special Appeals conducted a sensitive review of the record for evidence of a public purpose and concluded:

> "There is no evidence in the record supporting the County's declaration of public purpose. The evidence is not weak; it is simply not there. The record is replete with support for the fact that condemnation in the instant case inures solely to the benefit of the Greens and was so intended. . . . In essence, the County was using its powers of eminent domain to give Green access to and through Appellant's [Association's] private property. That is an inappropriate use of the condemnation power." (App. C-15 – C-16).

Since a determination of whether the purpose for a particular taking is truly public or private is ultimately a judicial question, the judiciary has an obligation to scrutinize the evidentiary record in those cases to evaluate the character of the taking. While governmental decisions to

condemn may be entitled to some deference, a deferential evaluation of the evidentiary record by the Court does not mean that the Courts may blindly accept government's proclamation of the "public" character of a use and abdicate their judicial obligation to scrutinize the record. That is precisely what the Court of Appeals of Maryland has done in this case.

This action was an *ad hoc* decision by the original plaintiffs/condemnors, to acquire a portion of the Association's property and is not part of a broader jurisdiction-wide social legislation program such as piecemeal takings pursuant to land reform or urban renewal legislation.

In the spirit of *Dolan v. City of Tigard, supra,* as an *ad hoc* exercise the evidentiary record of the Commissioners' decision to take the Association's land should be more closely scrutinized than the deferential treatment accorded to takings pursuant to broad social reform legislation.

Even minimal scrutiny of the record leads to the same conclusion drawn by the Court of Special Appeals of Maryland that, with regard to the public character of the taking, the evidence is not weak, it is simply not there. There is no palpable factual foundation upon which the taking of the Association's land can realistically be considered for a public purpose and therefore the Court of Appeals' decision should be reversed.

For reasons discussed below, it was improper for the Maryland Courts to permit Green to intervene as party

plaintiff/condemnors in this action against the Association once the condemning authority had decided to "settle" the case with the Association and in the exercise of their legislative prerogative entered into a "Conciliation Agreement" whereby the Commissioners agreed to halt the taking the Association's property through eminent domain.

For reasons stated above, a taking of the Association's land for what is clearly a "private" and not a "public" purpose violates the implicit prohibition on takings for private purposes of the "takings" clause of the Fifth Amendment to the United States Constitution and applicable provisions of the Maryland Constitution. In addition, the taking of the Association's land for purposes which are clearly private in litigation perpetuated and pursued by a private citizen lacking the State's power of eminent domain and lacking a requisite interest in the subject matter to participate in condemnation proceedings is also a violation of the Association's rights to due process protected by MD. CONST., DECLARATION OF RIGHTS, Art. 24 and preserved by the Federal Constitution against State action by the Fourteenth Amendment to the United States Constitution. See *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 25 S.Ct. 251, 49 L.Ed. 462 (1905).

2. THE MARYLAND COURTS CLEARLY ERRED BY ALLOWING THE GREENS, AS PRIVATE CITIZENS, TO PERMISSIVELY INTERVENE IN CONDEMNATION PROCEEDINGS FOLLOWING THE DECISION OF THE BOARD OF COUNTY COMMISSIONERS OF CARROLL TO ABANDON THE CONDEMNATION PROCEEDINGS AGAINST THE ASSOCIATION.

On May 8, 1995, after denying a previous request by Green to participate in these proceedings through intervention as set forth in the Maryland Rules of Procedure, the Court of Special Appeals granted Green's request for permissive intervention as plaintiffs/condemnors under Md. Rule 2-214. The Greens are not participating herein as *amicus curiae*. The Court of Appeals denied the Association's Cross-Petition for Certiorari requesting, *inter alia*, that Green's intervention be stricken or disallowed on December 19, 1995.

What Green sought through intervention was to usurp the Commissioner's power of eminent domain for Green's private benefit disregarding the legislative prerogative of the Commissioners, who deemed it proper to settle this dispute with the Association. (App. G-1 – G-4).

Eminent domain is a power vested in the State which can be delegated by the General Assembly to municipalities, State boards and agencies and other public or quasi-public bodies. Only those entities having received a delegation of this authority are permitted to exercise powers of condemnation of land in Maryland. (See generally, *Davis v. Montgomery County*, 267 Md. 456 at 468, 298 A.2d 178 at 185 (1972)).

Condemnation actions are special statutory proceedings generally provided for by ANN. CODE OF MD.; Real Property Art.; § 12-101 et seq. and Subtitle "U" of the Maryland Rules. Neither of these authorities provide for participation of private parties who have not been delegated the power of eminent domain, such as Green as plaintiffs/condemnors. In *Feldman v. Star Homes, Inc.*, 199 Md. 1, 84 A.2d 903 (1951), the Court of Appeals of Maryland suggested that owners of adjacent property have no sufficient property interest to entitle them to intervene in condemnation proceedings for acquisition of a neighbor's land when such intervention is sought to protect possible consequential damage to the land of the party seeking intervention.[2]

The Court of Appeals of Maryland has indicated that intervention decisions under Rule 24 of the Federal Rules of Civil Procedure serve as a guide to interpreting Maryland's Rule 2-214 since the Maryland Rule is modeled after the Federal Rule. See generally, *Coalition for Open Doors v. Annapolis Lodge No. 622 Benevolent and Protective Order of Elks*, 333 Md. 359, 635 A.2d 412 (1994).

The United States Court of Appeals for the Seventh Circuit has determined the appropriate scope of intervention allowed under Federal Rule 24 where a third party

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[2] Other jurisdictions and Federal courts have similarly disposed of third party requests seeking intervention to protect intervenors' interests implicated by condemnation proceedings. See, for example, *Laclede Gas Company v. Abrahamson*, 296 S.W.2d 100 (Missouri) (1956) and *United States v. 36.46 Acres of Upland*, (ED NY) 113 FRD 124 (1986).

sought to intervene as plaintiff/condemnor in a condemnation proceeding. In *United States v. 36.96 Acres of Land, more or less, situated in the County of LaPorte, State of Indiana*, 754 F.2d 855 (1985), the Seventh Circuit held that a third party does not have sufficient interest in condemnation proceedings to justify intervention as plaintiff/condemnor as of right or permissively. The facts of that case involved the Federal government's condemnation of land owned by the Northern Indiana Public Service Company known as Crescent Dune located on the south shore of Lake Michigan to be incorporated as part of the Indiana Dunes National Lakeshore located immediately adjacent to Crescent Dune. The party seeking intervention was a non-profit public interest group seeking legal protection for public use of lakeshore dunes such as Crescent Dune in Indiana. The Court noted that the group had "played a laudatory role in the development of the Indiana Dunes National Lakeshore. . . . ", *United States v. 36.96 Acres of Land*, 754 F.2d at 858.

The Seventh Circuit indicated that eminent domain proceedings consider only two legal interests. "The first interest is that of the sovereign to exercise the power of eminent domain, . . . [t]he second interest in an eminent domain proceeding is one of private ownership – essentially the ownership of the condemned property." *United States v. 36.96 Acres of Land, ibid.*

The Court recognized that the fee owner of the property was Northern Indiana Public Service Company and that the Council seeking intervention could therefore not claim the second or ownership interest implicated by the condemnation proceeding alluded to above. The Court also indicated that "the Council cannot claim that its right

to intervene derives from the sovereign of authority to condemn property for public use. No entity, public or private, other than the legislature, can claim the sovereign authority to condemn property – a 'direct, significant legally protectable interest' – unless Congress had delegated that authority to the party" (citation deleted) *United States v. 36.96 Acres of Land, ibid.*

The Seventh Circuit held that the party seeking to participate through intervention as plaintiff/condemnor had no "interest" in the action sufficient to justify intervention as a matter of right or to justify the grant of permissive intervention. *United States v. 36.96 Acres of Land*, 754 F.2d at 860.

Accordingly, in this action, Green is not among the class of persons who may lawfully participate as plaintiffs in eminent domain proceedings in Maryland. Even more significantly, they have not been delegated the authority to exercise eminent domain.

The intervention by Green as party plaintiff/condemnors is inconsistent with these authorities regarding substantive law of intervention, and, as indicated above, it is also a denial and violation of the Association's right to due process of law protected by both the Federal and Maryland Constitutions.

CONCLUSION

For the reasons discussed above, the record in this case clearly shows that the taking of the Association's land was not for a constitutionally permitted "public" purpose or use but for the pure private benefit of Green at Green's request. The Court of Appeals failed to even minimally scrutinize the evidentiary record and appears to have blindly accepted the bald characterization of the purpose for taking a portion of the Association's land asserted by local government and Green.

Further, the Maryland Courts allowed Green as private citizens who do not have the benefit of the delegation of the State's authority to exercise eminent domain to intervene in this action as party plaintiffs/condemnors contrary to both State and Federal authorities which have addressed the substantive issues of the right to intervene in condemnation proceedings.

As a result, the Association's right to have its property condemned for only public and not private purposes protected by the Federal and Maryland Constitutions has been violated as well as their right to due process of law. The allowance by the Court of Appeals of Maryland of the "private" taking of the Association's property and the allowance of Green's right to intervene in these proceedings are inconsistent with other decisions of the Court of Appeals of Maryland, with appellate courts of other states and with decisions of Federal Courts of Appeal.

It is appropriate for this Court to issue a Writ of Certiorari to the Court of Appeals of Maryland to consider this case.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

Nos. 125 & 126

September Term, 1995

AARON E. GREEN & RUTH E. GREEN

v.

HIGH RIDGE ASSOCIATION, INC.

BALTIMORE COUNTY, MARYLAND

v.

ALLAN J. GODLEWSKI et al.

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* Murphy, C.J.,
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker,

JJ.

Opinion by Eldridge, J.,

Filed: June 6, 1997

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* Murphy, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the adoption of this opinion.

These two cases concern the propriety of Carroll County's and Baltimore County's exercise of eminent domain over two parcels of private property. The specific questions presented to this Court in both cases are whether each condemnation serves a "public use" in accordance with Article III, § 40, of the Maryland Constitution,[1] and whether each condemnation is "needed" or "required" for such public use in accordance with Maryland Code (1957, 1996 Repl.Vol.), Art. 25, § 11A(a)(1)(i), and Art. 25A, § 5(B).[2]

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[1] Article III, § 40, of the Maryland Constitution provides as follows:

> **"Section 40. Eminent domain.**
>
> The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation."

[2] Art. 25, § 11A(a)(1)(i), applicable in county commissioner counties such as Carroll County, states (emphasis added):

> "(1) Except as provided in subsection (b) of this section, the county commissioners of every county may:
>
> (i) Acquire by purchase, gift, devise, bequest, condemnation, or otherwise, any property, or any interest therein, of any kind *needed* for any public purpose;. . . ."

Art. 25A, § 5(B), applicable to charter counties such as Baltimore County, authorizes the counties, *inter alia*, "to provide for the . . . condemnation of property *required* for public purposes in the county. . . ." (Emphasis added).

I.

As this opinion encompasses two separate cases, we shall discuss the facts of each case in turn.

A. No. 125, Green v. High Ridge Association, Inc.

The petitioners Aaron and Ruth Green own a 135 acre farm in Carroll County, a portion of which they plan to develop into thirteen residential lots. This portion of the Greens' property is adjacent to the High Ridge subdivision and is separated from the end of High Ridge Drive by an unimproved 750 square foot strip of land owned by the respondent High Ridge Association, Inc. Presently, this strip of land is used as a pedestrian pathway by homeowners, including the Greens, residing near and within the High Ridge subdivision. High Ridge Drive, which ends at this pedestrian pathway, is a public road owned and maintained by Carroll County.

The Greens sought to extend the end of High Ridge Drive to their property line for ingress to, and egress from, their proposed residential development. The Greens contacted the County Commissioners of Carroll County, who directed the Carroll County Planning and Zoning Commission to study the possibility of condemning the 750 square foot strip of land.

In a report to the Planning and Zoning Commission, Commission staff members recommended acceptance of the Greens' plan to develop their property and to extend High Ridge Drive to their property line. The recommendation was conditioned, however, upon the Greens

"gain[ing] in-fee access to High Ridge Drive or demonstrat[ing] the ability to build a County road across the fifteen-foot-wide Homeowners Association strip to High Ridge Drive." The Planning and Zoning Commission adopted its staff's conditional recommendation, determining that the "road in question was clearly laid out to extend to and intersect with the adjoining property line of the Aaron Green property." The Commission further determined that any deviation from this original plan resulted from an "error" on the final recorded plat which "did not reflect what had been intended and approved." After reviewing the findings of the Planning and Zoning Commission, the Carroll County Commissioners voted to condemn the 750 square foot strip of land in order to extend the public road.[3]

The County Commissioners filed a complaint in the Circuit Court for Carroll County to condemn the 750 square foot strip of land. After a trial on the issue of the County's right to condemn, the circuit court filed a memorandum and order concluding that the condemnation was authorized. Relying upon *Anne Arundel County v. Burnopp*, 300 Md. 343, 478 A.2d 315 (1984), the circuit

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[3] According to testimony at trial, the Commissioners sought to condemn the Association's strip of land: (1) to carry out the intent of the master plan by extending a planned public road; (2) to correct an "error" in the master plan which improperly labeled the subject parcel as part of the Association's, rather than the County's, property; (3) to assure that new residences would be served by the new public road; (4) to facilitate the County's overall plan to cluster homes away from farm land; and (5) to avoid having to provide alternative access to the Greens' property by building 1/2 mile of additional road at the County's expense.

court held that because "the newly extended High Ridge Drive will be open to the public for use," the condemnation of the strip was for a "public use." Moreover, the court found "nothing in the decision [to condemn the property] itself or in the decision-making process which is so oppressive, arbitrary or unreasonable as to suggest bad faith." Thereafter, the parties stipulated in the circuit court to the fair market value of the condemned property, and a judgment of condemnation was entered in favor of the County. Two days later, the County paid the amount of the judgment into court.

The Association filed a timely notice of appeal to the Court of Special Appeals. After the record and a joint record extract were filed with the intermediate appellate court, but before the submission of the County's brief, the County filed in the Court of Special Appeals an "Election to Abandon" the condemnation.[4] The Court of Special Appeals rejected the election on the ground that a taking had already occurred.[5] As a result, the County elected not to participate further in the appeal, and the Greens were permitted to intervene.

The Court of Special Appeals reversed, holding that the condemnation was not for a "public use" and was not "necessary." *High Ridge v. County Comm.*, 105 Md. App.

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[4] Between the initiation of this lawsuit and the Association's appeal, a new County Board of Commissioners was elected.

[5] The Court of Special Appeals' order rejecting the County's election has not been challenged in this Court. Therefore, the issue is not before us.

423, 660 A.2d 951 (1995). The intermediate appellate court explained (105 Md. App. at 436, 660 A.2d at 957):

> "In neither the legislative proceedings authorizing the filing of the Complaint for Condemnation nor the Complaint itself does the County, other than by a bald claim of public purpose, proffer any public purpose objectives or necessity or proffer any *evidence* of any such purpose or necessity to justify condemnation of the private pedestrian path located in High Ridge Estates." (Emphasis in original).

The court continued as follows (105 Md. App. at 437-438, 660 A.2d at 958):

> "The Commissioners' decision to initiate condemnation in the case at bar was clearly and solely made to enhance the private interests of the Greens. In essence, the County was using its powers of eminent domain to give [the] Green [s] access to and through appellant's private property. That is an inappropriate use of the condemnation power. The County's action was thus oppressive, arbitrary and unreasonable. The trial court erred in upholding the condemnation. On the basis of the record in the case *sub judice*, no rational inferences of a genuine public purpose are possible."

The Greens filed a petition for a writ of certiorari, challenging the holdings that the condemnation was not for a public use and that there was no necessity for the taking. The High Ridge Association filed a cross-petition for a writ of certiorari, arguing that the Court of Special Appeals erred in permitting the Greens to intervene. This

Court granted the Greens' petition and denied the Association's cross-petition. *Green v. High Ridge Association*, 341 Md. 30, 668 A.2d 422 (1995).

B. No. 126, Baltimore County v. Godlewski

The subject parcel of land, 30 foot wide and 144 foot deep, is located in the community of Miller's Island in southeast Baltimore County.[6] The parcel is one of 12 road ends terminating at the waters of Hawk Cove at the mouth of Back River. This strip of land is at the end of 4th Street and is adjacent to property owned by Allan and Sharon Godlewski. On March 21, 1991, Rose Sapperstein and the White Eagle Polish-American Building & Loan Association of Baltimore City, Inc., deeded the 4th Street road end to the Godlewskis. Baltimore County also maintains an easement in this parcel "to lay, construct and maintain sewers, drains, water pipes and other municipal utilities and services," granted to it by Sapperstein on November 16, 1984.

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[6] Although the community is called Miller's Island (or sometimes Millers Island), it is not an island. Instead, it is a peninsula bounded on three sides by Back River, Hawk Cove, and the Chesapeake Bay. There was an actual island nearby which was called "Miller Island" and was uninhabited. Miller Island, along with Hart Island and Pleasure Island, made up a string of three islands separating Hawk Cove from the Chesapeake Bay. The area between Miller Island and Hart Island has been filled in by the State, and today they constitute a single island called "Hart Miller Island."

Fearing the termination of their access to Hawk Cove after the sale of the 4th Street road end, local homeowners petitioned county officials for the condemnation of all 12 road ends "to preserve access to Hawk Cove by residents for emergency purposes, for flood control and for recreational use." Thereafter, the County agreed to the condemnation of the road ends between 1st and 12th Streets.

The County then filed in the Circuit Court for Baltimore County a petition for condemnation of the 4th Street road end.[7] At the trial, the Director of Recreation and Parks for Baltimore County testified that the property was being condemned (1) to insure that residents of Miller's Island had access to Hawk Cove, (2) to insure that County emergency equipment could access the water through the road end, and (3) to insure the free flow of storm water to the Cove. Other testimony showed that residents frequently accessed Hawk Cove over the 4th Street road end.

Following the trial, the circuit court denied the petition, holding that the condemnation was not necessary and was not for a public purpose. The court rejected all three public purposes asserted by the County to justify the condemnation. The court reasoned that alternative access routes existed throughout Miller's Island for emergency relief and that the County maintained an easement

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[7] There were similar petitions filed in the circuit court to condemn the other 11 road ends. The record, however, does not reveal the status of those petitions, nor are those petitions directly involved in this case.

across the road end for flood and drainage control. Furthermore, the court relied on the fact that there were existing public recreational areas near the community of Miller's Island, stating: "[We] don't live in a perfect world where you can walk out your door and do whatever you want. . . . We have to drive to go to a ball field or to a basketball court or to go fishing."

Baltimore County filed a timely notice of appeal, and, prior to argument in the Court of Special Appeals, this Court issued a writ of certiorari.

II.

The right of a Maryland governmental body to exercise eminent domain is limited by Article III, § 40, of the Maryland Constitution, which requires that the taking of private property be "for public use" and that "just compensation be paid." In addition, the statutory provisions applicable to these cases expressly provide that the property be "needed" or "required."

A.

This Court has pointed out that "[n]o satisfactory single clear-cut rule regarding what is a public use, which can decide all cases, has yet been formulated." *Pr. George's Co. v. Collington*, 275 Md. 171, 181, 339 A.2d 278, 284 (1975). While the decision of whether a particular use is "public" is ultimately for the judiciary, a court will give weight to the determinations of the legislative and executive branches of government. *City of Baltimore v. Chertkof*, 293 Md. 32, 42-43, 441 A.2d 1044, 1051 (1982); *Pr. George's*

Co. v. Collington, supra, 275 Md. at 190-191, 339 A.2d at 288-289; *Boswell v. Prince George's Co.,* 273 Md. 522, 529, 330 A.2d 663, 667-668 (1975); *Herzinger v. City Council of Baltimore,* 203 Md. 49, 62-63, 98 A.2d 87, 93 (1953); *Riden v. Phila., B. & W. R. R. Co.,* 182 Md. 336, 342-343, 35 A.2d 99, 102 (1943).

Moreover, we have held that "public use" is not limited to circumstances where "the public . . . literally or physically [is] permitted to use the property taken by eminent domain." *Pr. George's Co. v. Collington, supra,* 275 Md. at 182, 339 A.2d at 284. *See, e.g., Williams v. Anne Arundel County,* 334 Md. 109, 120-121, 638 A.2d 74, 79 (1994) ("The decisions of this Court furnish multiple illustrations of . . . public purposes despite the fact that there was also a benefit to privately owned property from which the public at large could rightfully be excluded"); *City of Baltimore v. Chertkof, supra,* 293 Md. at 42, 441 A.2d at 1050 ("condemnation . . . for urban renewal purposes . . . embodies a broad concept of public use, not limited to actual use by the public, but rather to use benefitting the public"); *Herzinger v. City of Baltimore, supra,* 203 Md. at 60-61, 98 A.2d at 92; *Flaccomio v. City of Baltimore,* 194 Md. 275, 278-280, 71 A.2d 12, 13-14 (1950); *Marchant v. Baltimore,* 146 Md. 513, 521, 126 A. 884, 887 (1924) ("The public character of the use to which the [properties] are devoted is not affected by the fact that they may not all be made available for the indiscriminate use of the public"); *Pitznogle v. Western Md. R. R. Co.,* 119 Md. 673, 87 A. 917 (1913); *M. & C.C. of Baltimore v. Brengle,* 116 Md. 342, 348-349, 81 A. 677, 680 (1911); *N.Y. Mining Co. v. Midland Co.,* 99 Md. 506, 514-516, 58 A. 217, 221 (1904); *New Central Coal Co. v. George's Creek Coal & Iron*

Co., 37 Md. 537, 561 (1873) (condemnation of land for a privately owned railroad spur for the benefit of a private mining business constituted a public use, as "[i]t has . . . been the settled policy of the State, for many years past, to stimulate [private mining] enterprise . . . for the purpose of developing the large mineral resources in the western portion of the State").

Although the meaning of "public use" under Article III, § 40, of the Constitution is broader than literal use by the members of the public, and while actual use of the condemned property by the general public is not necessary, nonetheless, when the general public is entitled to physically use the condemned property, the use is "public" for purposes of the constitutional provision.

Thus, in *Riden v. Phila., B. & W. R. R. Co., supra,* 182 Md. at 342, 35 A.2d at 102, in holding that the condemnation of private property to construct a branch railroad line designed to serve only the Bowie Race Track constituted a "public use," this Court emphasized:

> "In this State we have held that the words 'public use,' as written in our Constitution, mean use by the public."

Later the court reiterated (182 Md. at 345, 35 A.2d at 103):

> "Since the branch line to Bowie Race Track will presumably be open to the general public, we hold that it is for public use, and that condemnation of land for that purpose does not violate the Declaration of Rights and the Constitution of Maryland or the Fourteenth Amendment of the Federal Constitution."

The Court in *Riden* also made it clear that the critical factor is the general public's entitlement to use the property, and not whether a large segment of the general public would likely use the property (182 Md. at 344, 35 A.2d at 103), saying: "If the branch line . . . is open to the public . . . , the number of people who will actually use it is immaterial." *See also, e.g., Webster v. Pole Line Co.*, 112 Md. 416, 426, 76 A. 254, 257 (1910) (" 'the test whether a use is public or not, is whether a public trust is imposed on the property; whether the public has a legal right to the use, which cannot be gainsaid or denied, or withdrawn' "); *Arnsperger v. Crawford*, 101 Md. 247, 253, 61 A. 413, 415 (1905); *N.Y. Mining Co. v. Midland Co., supra*, 99 Md. at 514, 58 A. at 221.

Consequently, the condemnation of private property for a public highway, street, or road constitutes a "public use" within the meaning of Article III, § 40. Since the members of the general public are entitled to use a public highway, street, or road, this Court has, without exception, held that condemnation for such purposes is constitutionally authorized.

Recently, in *Anne Arundel County v. Burnopp, supra*, 300 Md. 343, 478 A.2d 315, Anne Arundel County sought to condemn a private road which served a relatively few homes and led to a dead end. The circuit court in *Burnopp*, like the Court of Special Appeals in the present *Green* case, held that the condemnation was not for a public purpose because there was no evidence of "a public need for this," because the only reason was to serve a relatively few properties, and because, in the court's judgment, these properties were adequately served by an existing private road. This Court reversed, stating in an

opinion by Judge Marvin Smith (300 Md. at 350, 478 A.2d at 319):

> "There can be no dispute of the fact that condemnation of private property for a public highway or road is a proper public use. *See, e.g., Bond v. M. & C.C. of Baltimore,* 116 Md. 683, 82 A. 978 (1911). A determination that such is a public use is not affected by the fact that although the public may have the right to use a street it seldom does."

The Court in *Burnopp* went on to quote with approval 2A Nichols, *The Law of Eminent Domain,* § 7.22[1] (Sackman ed. 1983), that

> " 'it is no legal objection that a proposed highway will be a *cul de sac,* or that it will lead to the residence or place of business of but one individual, for the public may desire to visit or do business with him. If a road is to be open for public travel the purpose for which the public may wish to travel is not material, and land may be taken by eminent domain for a road which is intended solely for driving for pleasure and recreation or to furnish a view of beautiful natural scenery. Streets are frequently laid out for the purpose of opening up private land, but if a street is to be open to public travel it is well settled that it is for the public use, although it is of especial convenience or advantage to certain individuals, or even if its sole or principal object is to enhance the value of the land through which it passes. . . . ' "

The Court of Special Appeals' opinion in the instant *Green* case relied chiefly on that court's view that the public road would simply "enhance the private interests

of the Greens" (105 Md. App. at 437, 660 A.2d at 958) and would only benefit their development. This type of argument was answered long ago in *M. & C.C. of Balt. v. Brengle, supra,* 116 Md. at 348-349, 81 A. at 678, in which Chief Judge Boyd for the Court stated:

> "It can not be said that, because some parties may receive more direct benefits than the public at large . . . , it is therefore for a private and not a public use. A street opened, graded and paved through a piece of land may enable the owner to sell lots for many times their former value, and it sometimes results in making a few persons wealthy; but it can not be said that because the opening of the street may have such an effect it is for a private and not a public use. It is perhaps rare for an application to be made to the county commissioners of a county to open, alter or close a road, excepting when one or more persons are specially interested in having it done."

In *Dobler v. Baltimore,* 151 Md. 154, 165, 134 A. 201, 205 (1926), Judge W. Mitchell Digges for the Court explained that

> "it is clear that the regrading and paving of Clement Street . . . constituted a public use; that is to say, it was done for the purpose of the public's using it. All of the public have a perfect and undeniable right to resort to the use of this street whenever their business, convenience, or pleasure may require;. . . . The fact that the defendant American Sugar Refining Company, or any other person or corporation in that immediate vicinity, derive a greater benefit from the improvement than may be derived by the

> public in general, in no way changes the rule or makes it any the less a public use."

The Court further recognized (151 Md. at 166, 134 A. at 205-206) that

> "it is usual for the authorities, both in the city and counties, to open, close, grade and improve streets and highways as a result of the request, and in many instances the insistence, of parties either residing or owning property in the neighborhood in which the road may be opened or closed. If it were held under such circumstances that any action by the authorities in response to such request constituted the improvement [of] a private rather than a public use, and was therefore illegal, betterments along this line would be very greatly minimized. It follows that if the American Sugar Refining Company, who owned or proposed to acquire property along Clement Street, requested the city authorities to take the action which is shown in this case, or even made such action a condition to its establishment of a branch factory in Baltimore City, it does not render such action a private, as contra distinguished from a public, use."

See also, e.g., Boswell v. Prince George's Co., supra, 273 Md. at 525, 528-529, 330 A.2d at 665, 667-668 (condemnation for a road could not be defeated on the ground that the project was designed "to satisfy a local pressure group"); *State Roads Comm. v. Franklin,* 201 Md. 549, 561, 95 A.2d 99, 105 (1953) ("It might well be that the construction of this 'expressway' to be completed in the distant future will inflict hardships upon many individuals. That is a legislative problem, not judicial"); *Murphy v. State Roads Comm'n,* 159 Md. 7, 149 A. 566 (1930); *Bond v. M. & C.C. of*

Baltimore, 116 Md. 683, 689, 82 A. 978, 981 (1911) (where property is condemned for a public highway, "there can be no possible or serious dispute that the use . . . is for a public use"); *Baltimore v. Clunet*, 23 Md. 449 (1865); *State v. Graves*, 19 Md. 351, 369 (1863) ("The act of opening, widening and closing streets, is an exercise of the right of *eminent domain*"); 2A *Nichols on Eminent Domain*, § 7.03[4] (3d ed. 1997) ("a public highway is unquestionably for a public use and may be established by eminent domain even if one person uses it, so long as that person uses it as a member of the public").

The principle that a public road or street constitutes a "public use" within the meaning of Article III, § 40, is underscored by the cases in this Court indicating that a particular use was not public. The only circumstance in which this Court has taken the position that a governmental condemnation was not for a public use has involved the condemnation of a public easement in a road and a closing of that road for the sole benefit of one particular adjacent property owner, resulting in other property owners and the general public being deprived of their pre-existing entitlement to use the road. *Van Witson v. Gutman*, 79 Md. 405, 29 A. 608 (1894). *See also Perellis v. M. & C.C. of Balto.*, 190 Md. 86, 57 A.2d 341 (1948); *Huebschmann v. Grand Company*, 166 Md. 615, 172 A. 227 (1934); *Arnsperger v. Crawford, supra*, 101 Md. 247, 61 A. 413; *Townsend, Grace & Co. v. Epstein*, 93 Md. 537, 49 A. 629 (1901). It is precisely because other landowners and the general public "lose their easement to the closed portion" (*Van Witsen v. Gutman, supra*, 79 Md. at 411, 29 A. at 610) or suffer "impairment of the existing means of access" (*Perellis v. M. & C.C. of Balto., supra*, 190 Md. at 95,

57 A.2d at 345), for the sole benefit of one particular property owner, that the governmental action was deemed to be for a private purpose. These cases demonstrate that, with regard to streets and roads, access by the general public is "public use" for purposes of the constitutional provision.[8]

In both of the cases at bar, the condemnations were for public roads. Members of the general public would be entitled to use the roads. Accordingly, the condemnations were for "public" uses within the meaning of Article III, § 40, of the Maryland Constitution.

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[8] Although it is clear from the language of Article III, § 40, and the language in numerous opinions by this Court, that the condemnation of property must be for a "public" use, it may be noteworthy that there appear to be no direct condemnation cases in this Court in which the Court has actually held that a particular governmental condemnation was for a "private" use. While the *Van Witson* case represented an actual holding by this Court, it was not in a condemnation case. The condemnation case had apparently been terminated, and the case before this Court was an equitable proceeding by those formerly entitled to use the road for an injunction against the private beneficiary of the condemnation. The *Perellis* case was a declaratory judgment action challenging on their face two ordinances authorizing condemnation. Both *Huebschmann* and *Townsend* were equitable actions to remove obstructions which the defendants had placed in public streets allegedly pursuant to municipal permission; neither case involved a condemnation proceeding or an ordinance specifically authorizing a condemnation proceeding. *Arnsperger* involved a statutory circuit court proceeding challenging county action granting a private road to the defendant-appellant; this Court dismissed the appeal on the ground that there was no statutory authorization for an appeal from the circuit court's judgment.

B.

As earlier mentioned, the Court of Special Appeals in the Green case and the circuit court in the *Godlewski* case also held that there was no necessity for the condemnations.

This Court has held, however, that the question of whether there is a "necessity" for a particular condemnation is primarily for the legislative and/or executive branches of government. *See, e.g., County Comm'rs v. Schrodel,* 320 Md. 202, 216-217, 577 A.2d 39, 46 (1990); *Anne Arundel County v. Burnopp, supra,* 300 Md. at 348-349, 478 A.2d at 318-319; *Wash. San. Comm. v. Santorios,* 234 Md. 342, 346, 199 A.2d 206, 208 (1964) (" 'The necessity is for the condemnor and not for the courts to decide,' " quoting with approval 1A *Nichols On Eminent Domain,* § 4.11[3] (3d ed.)); *State Roads Comm. v. Franklin, supra,* 201 Md. at 557, 95 A.2d at 103; *Murphy v. State Roads Comm'n, supra,* 159 Md. at 15, 149 A. at 570 ("Ordinarily the question of whether a proposed highway is required by public necessity is legislative rather than judicial").

The determination by a condemning authority that a particular taking is "necessary" will not be set aside by the courts unless the condemnor's decision "is so oppressive, arbitrary or unreasonable as to suggest bad faith," *Anne Arundel County v. Burnopp, supra,* 300 Md. at 349, 478 A.2d at 318. Moreover, the burden is upon those challenging the condemnation to establish such bad faith, *County Comm'rs v. Schrodel, supra,* 320 Md. at 217, 577 A.2d at 46. No such showing was made in either of the present cases.

It is clear that Carroll County and Baltimore County were each entitled to condemn the subject parcels for public roads.

IN No. 125, THE JUDGMENT OF THE COURT OF SPECIAL APPEALS IS REVERSED, AND THE CASE IS REMANDED TO THAT COURT WITH DIRECTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY THE RESPONDENT.

IN No. 126, THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS REVERSED, AND THE CASE IS REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE RESPONDENTS.

APPENDIX B

IN THE CIRCUIT COURT FOR
CARROLL COUNTY, MARYLAND

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND	*	CASE NO. C-92-13555
Plaintiff	*	
vs.	*	
HIGH RIDGE ASSOCIATION, INC.	*	
Defendant	*	

********** **********

MEMORANDUM OPINION

This suit is before the Court on Plaintiff's Complaint to condemn certain real property owned by Defendant. A hearing on the issue Plaintiff's right to condemn the property was held before this Court on December 2, 1992, at the conclusion of which the matter was held *sub curia* awaiting submission of memoranda from the parties. We have received the parties' original memoranda (each filed on December 23, 1992), Defendant's Supplement to Memorandum of Argument (filed on February 18, 1993) and Plaintiff's Answer thereto (filed on February 22, 1993).

BACKGROUND

On February 27, 1992 the County Commissioners of Carroll County, Maryland, a body corporate, determined

that it should acquire certain land owned by Defendant for use as a county-maintained roadway, open to the public for use. It offered to purchase the property from Defendant; Defendant refused to sell. The Commissioners then filed the instant suit to take the property by eminent domain.

The property to be acquired is a strip of land, approximately fifteen feet (15') wide and fifty feet (50') long, which is located wholly within a private right-of-way in favor of various parcels of property situated to the north of High Ridge subdivision. The subdivision itself is located on the northeast side of Maryland Route 32 near its intersection with Klee's Mill Road. The strip sought to be acquired is adjacent to the easternmost boundary line of High Ridge Drive.

In 1973, when Andrew A. Soellner, Jr. initially submitted the subdivision plans for High Ridge Subdivision to the appropriate officials for review and comment, what is now known as High Ridge Drive was depicted as a minor street terminating in a *cul de sac*. County officials required Soellner to change the configuration of this street to facilitate the anticipated future development of adjoining property (the Charles E. Green farm).[1] At the direction of the County, Soellner changed the terminus of

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[1] At that time, the County anticipated that Carroll County's Agricultural District would be a growth district and that the farms would be replaced with residential subdivisions. Landowners were allowed as much as one subdivision lot per one-half acre of land. In 1978, Carroll County adopted a new zoning ordinance, imposing much more restrictive density standards. Now, landowners such as Mr. Green are permitted one subdivision lot per twenty acres of land.

the street from a *cul de sac* to its present configuration. The street was changed to have an even width of fifty feet (50') for its entire length, terminating on the boundary line of the fifteen foot wide right-of-way mentioned above. After the County required Soellner to eliminate the *cul de sac*, he prepared another preliminary plat depicting the terminus of the street at the Soellner/Green property boundary line in accordance with the County's long-term plans.[2] According to the testimony of Defendant's witness, Mr. Ronald E. Bailey, then assistant Planning Director for Carroll County, the appropriate county officials reviewed the revised preliminary plat (now also depicting private rights-of-way) and determined that, for the time being, it was not necessary to acquire fee simple title to so much of the platted street as was contained within the boundaries of the fifteen foot wide private right-of-way. Mr. Bailey also testified that the County was concerned about the possibility of incurring liability for providing snow removal and other county services (to the owners of the dominant tenements served by the right-of-way) if the County became the fee owner of this section of the platted but unimproved street. According to Mr. Bailey, in an abundance of precaution and an attempt to avoid future hassles, the County instructed Soellner to terminate the street at the beginning of the right-of-way

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[2] Because of the County's vision of increased population density, the County's master plan called for additional roads and streets functioning as collector streets to collect traffic and move it from one arterial road to another. Nottingham Drive and High Ridge Drive were planned collector streets according to the testimony of Carroll County Planning and Zoning Director, Edward Cueman.

boundary line and to incorporate that change onto the final plat.

In contrast to this testimony, Plaintiff's witness, Mr. Edward Cueman, who was Mr. Bailey's supervisor then, testified that there was no such hard and fast County policy regarding rights-of-way in 1973. Mr. Cueman actually approved the final subdivision plat and executed it as Secretary of Carroll County Planning and Zoning Commission. He testified on cross examination that High Ridge Drive ended at the property boundary line according to the preliminary plat that he reviewed. Cueman, the current Director of Planning and Zoning, and Bailey both agree that High Ridge Drive was designed to be extended into the Green property and that that design change was made at the insistence of the County. Then, the County envisioned that future residential lots would be carved out of the Green farm; the County's vision was that the owners of these lots would utilize High Ridge Drive for access to their homes. The County received fee simple title to the street identified as High Ridge Drive as it is depicted on the final approved subdivision plat, Plaintiff's Exhibit No. 4. As shown on the final plat, High Ridge Drive is fifteen feet shy of the Green/Soellner boundary line.

The Charles E. Green property is now owned by Mr. Aaron Green who wishes to develop it and has submitted preliminary plans to the County for review and comment. Mr. Green's proposed development necessarily utilizes existing county roads and streets to provide access for the future homeowners in the development. The concept plan proposes that building lots suitable for single family residences be located in the southeastern section of Mr.

Green's farm, near his existing home, permitting him to maintain the balance of the property as a viable farm. Ultimately, the County concluded that High Ridge Drive should be extended into the adjoining Green property as a means of providing access. Another alternative, to extend Nottingham Drive from High Ridge Subdivision into the property, was not pursued. Carroll County Commissioner Donald Dell testified that this alternative would require a much longer new road, increasing Mr. Green's construction costs in the short-term and increasing county maintenance costs in perpetuity. Additional facts are set forth below in connection with specific arguments.

THE LAW

Pursuant to Art. 25, Md. Code Ann., § 11A(a)(1):

> [T]he County Commissioners of every county may: (i) Acquire by purchase, gift, devise, bequest, condemnation, or otherwise, any property, or interest therein, of any kind needed for any public purposes. . . .

Defendant contends that the instant taking is not for public use and that it is unnecessary. We will, therefore, address both public use and public necessity in our analysis.

Public use. In *Anne Arundel County v. Burnopp*, 300 Md. 343 (1984), the Court of Appeals reviewed applicable Maryland case law in this area. The trial court found that Anne Arundel County had not established that its proposed use of the property sought to be condemned was public in nature because the property was to be used as a

street which ended in a dead end. The Court discussed the controlling case law in detail and concluded that, *"There can be no dispute of the fact that condemnation of private property for a public highway or road is a proper public use.* A determination that such use is a public use is not affected by the fact that although the public may have the right to use a street it seldom does." *Id.*, at 350. (Citation omitted; emphasis ours). The Court rejected the property owners' contention as to use:

> It is suggested that because this street is a dead end or *cul de sac* that this in some manner prevents it from being for public use. This issue is considered in 2A Nichols, *The Law of Eminent Domain*, § 7.22[1] which states:
>
> > "[I]t is no legal objection that a proposed highway will be a *cul de sac*, or that it will lead to the residence or place of business of but one individual, for the public may desire to visit or do business with him. If a road is to be open for public travel the purpose for which the public may wish to travel is not material, and land may be taken by eminent domain for a road which is intended solely for driving for pleasure and recreation or to furnish a view of beautiful natural scenery. *Streets are frequently laid out for the purpose of opening up private land, but if a street is to be open to public travel it is well settled that it is for the public use,* although it is of especial convenience or advantage to certain individuals, or even if its sole or principal object is to enhance the value of the land through which it passes. . . . " *Id.* at 7-129 to - 132. *Id.*, at pages 351-352. (Emphasis ours).

In the case at bar, Defendant asserts that the proposed use of the road is not public. We find no support for this contention. The newly extended High Ridge Drive, will be open to the public for use, just as the present High Ridge Drive (a county-owned and county-maintained temporary *cul de sac*) is. We conclude that the proposed use is a public use.

Public necessity. Applicable precedent dictates that our review of the condemning authority's decision regarding public need is limited. As reiterated by the Court of Appeals in *County Commissioners v. Schrodel*, 320 Md. 202 at 216 (1990):

> In a passage that has been repeatedly cited by this Court for sixty years, Judge Offutt for the Court in *Murphy v. State Roads Comm'n*, 159 Md. 7, 15, 149 A. 566, 570 (1930), summarized the judiciary's very limited role concerning governmental need for the property:
>
> > "Ordinarily the question of whether a proposed [location] is required by public necessity is legislative rather than judicial. . . . [T]he decision . . . as to the public necessity for taking particular property is not subject to judicial review unless [the] decision *is so oppressive, arbitrary or unreasonable as to suggest bad faith.*" (Emphasis added [by *Schrodel* Court]).

In the case at bar, the Minutes of the February 27, 1992 meeting of the County Commissioners reflect that:

> *[T]he Board voted to condemn such property as necessary to implement the Planning and Zoning Commission recommendation* with respect to the construction of a street to serve the Aaron Green

> Subdivision which will intersect with an existing culdesac in High Ridge Subdivision. The Planning Commission recommendation is as follows: "The staff recommends acceptance of the Concept Plan. However, prior to the Preliminary Plan approval, the owner must gain in-fee access to High Ridge Drive or demonstrate the ability to build a County road across the fifteen-feet-wide Homeowners Association strip to High Ridge Drive. The Planning Commission Decision is as follows: The Commission, on motion of Mr. Fisher, second by Mr. Pecoraro and carried, approved the concept plan as presented and as conditionally recommended above by the staff. In taking this action, the Commission on review finds, that the road in question as detailed and approved, on the approved preliminary subdivision plan was clearly laid out to extend to and intersect with the adjoining property line of the Aaron Green property; and further that the final plat prepared for record, deviated from the approved plan and was therefore in error in that it did not reflect what had been intended and approved (the eventual extension of the street into adjoining property)." Mr. Lippy cast a dissenting vote. (Emphasis ours).

The condemning authority, having found a need to take the subject property for a public purpose, the burden is on Defendant "to show that the County's decision 'is so oppressive, arbitrary or unreasonable as to suggest bad faith.' " *County Commissioners v. Schrodel, supra,* at 217. (Citation omitted).

The heart of Defendant's argument is that the Planning Commission's report to the County Commissioners

contains an error – i.e., in 1973 when Soellner's subdivision plan was approved, the County did not want to take title to the subject property. Thus, the final plat of High Ridge subdivision was approved properly in 1973 and the final plat does not deviate from the approved plan. Even if Defendant is correct in its assertion that the subject property was intentionally omitted from the bed of High Ridge Drive in 1973, this fact does not invalidate the County's current actions. Defendant suggests that the County's final decision is unreasonable because the Planning Commission did not contact Mr. Bailey – one of the men who had personally reviewed the High Ridge plat almost twenty years earlier – in reaching the decision that it was an error to approve this subdivision plat. We expressly reject this contention. The County's present review of the High ridge plat revealed what is perceived as an error. The County's independent investigative process in reaching that conclusion is not unreasonable. We find nothing in the decision itself or in the decision-making process which is so oppressive, arbitrary or unreasonable as to suggest bad faith.

Necessary parties. Defendant asks that we dismiss Plaintiff's Complaint pursuant to Md. Rule 2-211(c) for failure to join necessary parties. Defendant contends that dismissal is required because Plaintiff has not named the owners of the dominant tenements as additional Defendants.

Plaintiff here is seeking the acquisition of fee simple title to the subject property. The property as acquired by Plaintiff will remain subject to the easement in favor of others.

There is no requirement that Plaintiff must acquire fee simple absolute title, free and clear of all rights of others. *See,* e.g. *Brack v. Mayor of Baltimore,* 128 Md. 430 (1916).

Md. Rule U4(b) expressly provides that:

> A proceeding for condemnation shall be brought *against all persons whose interest in the property is sought to be condemned,* including any spouses having an inchoate right of dower, whether such persons are known or unknown, and such persons shall be designated as defendants. (Emphasis ours).

Plaintiff seeks to acquire the subject property pursuant to the provisions of *Md. Real Property Code Ann.* §§ 12-101, *et. seq.* Section 12-108 speaks to this issue. It provides:

> (a) Payment of judgment and costs. – On payment of the judgment and costs by the plaintiff pursuant to the provisions of Subtitle U of the Maryland Rules, the *plaintiff immediately shall become vested with the title, estate, or interest of the defendant* in the condemned property.
>
> (b) Title acquired. – The title acquired in a condemnation proceeding shall be an absolute or fee-simple title *including the right, title, and interest of each of the defendants* in the proceeding whose property has been condemned unless a different title is specified in the inquisition. (Emphasis ours).

In this action, therefore, Plaintiff simply will not be acquiring the rights of those persons who are not named defendants, regardless of the *in rem* nature of the proceedings. *Department of Natural Resources v. Welsh,* 308 Md. 54 (1986).

We believe that complete relief can be accorded among the parties to this action. Disposition herein will not impair or impede the dominant tenants' ability to protect their interests. Further, we do not believe that a party to this action is subject to a substantial risk of incurring multiple or inconsistent obligations by reason of the interests of the dominant tenants. Md. Rule 2-211. Accordingly, we decline to dismiss Plaintiff's Complaint for failure to join necessary parties.

CONCLUSIONS

For the foregoing reasons, we conclude that Plaintiff has the right to condemn the subject property and that this matter shall be set in for an inquisition on Defendant's damages.

December 15, 1993
Date

/s/ Luke K. Burns, Jr.
Luke K. Burns, Jr.
Judge

c: Isaac M. Menasche, Assistant County Attorney
David K. Bowersox, Esquire

APPENDIX C

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1388

SEPTEMBER TERM, 1994

HIGH RIDGE ASSOCIATION, INC.

v.

COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND

Cathell,
Davis,
Hollander,
JJ.

Opinion by Cathell, J.

Filed: June 29, 1995

Appellant, High Ridge Association, Inc., appeals the judgment of the Circuit Court for Carroll County (Burns, J., presiding), which found in favor of appellee, County Commissioners of Carroll County,[1] on its petition for condemnation of a portion of appellant's real property. Appellant challenges the public nature of the use to

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[1] We shall sometimes hereafter refer to the County Commissioners as the County.

which the condemned land will be put and proffers the following questions for our review:

I. Was the Commissioners' decision to condemn an unconstitutional, unlawful grant of a private remedy for the sole benefit and economic advantage of a single property owner, and not for a public purpose or benefit?

II. Was High Ridge Drive, as originally designed and approved, deliberately designed to terminate within the subdivision's property and not to extend into the subdivision's pedestrian open space area to the boundary of Mr. Green's property?

III. Was the Commissioners' decision to condemn unconstitutional due to lack of any necessity to condemn?

High Ridge Drive runs in an easterly direction through High Ridge Estates and terminates fifteen feet from the common boundary of the subdivision and property now owned by one Aaron Green and his wife, Ruth. The property sought to be condemned is a strip of land fifty feet wide extending from High Ridge Drive fifteen feet to the Greens' property. This strip now serves as a pedestrian right of way. Condemnation proceedings were instituted pursuant to the Greens' recent proposal to develop their property with residential lots, which, if condemnation were successful, would be situate along the proposed extension of High Ridge Drive that would then run into their property. Notably, several other access points, which terminate at other boundaries of the Greens' property, are available. Extension of any of these other streets would provide the necessary public road

access for the Greens' proposed development. The Greens' desire for access by way of High Ridge Drive is seen as having been motivated by financial considerations; the alternative access routes would have been "more expensive and not as economically practical for . . . development of [their] property."

The initiation of condemnation proceedings occurred after, and as a result of, the Greens, through counsel, contacting the County Commissioners by letter on January 25, 1991, suggesting that an "apparent error on the record plat [of High Ridge Estates] . . . complicat[ed] the plan to extend High Ridge Drive into the Green property," and that the County might consider exercising its power of eminent domain to resolve the "problem."

The Greens submitted a Concept Plan for development of their property on September 30, 1991, which included the lots proposed to be created on the extension into their property of High Ridge Drive over the parcel suggested to be condemned. A Special Report to the Carroll County Planning and Zoning Commission, prepared by Bruce Waldron, recommended acceptance of the concept Plan, conditioned upon the Greens' ability to "gain in-fee access to High Ridge Drive or demonstrate the ability to build a County road across the fifteen-feet-wide Homeowners Association strip to High Ridge Drive." The Report also stated the following with respect to High Ridge Estates:

> The approved Preliminary Plan of High Ridge Estates shows, by the absence of a permanent cul-de-sac, that the roads were intended to provide access for future development into adjacent properties. These temporary cul-de-sacs

were meant to be removed as the roads were extended. The approved Preliminary Plan of High Ridge *shows a separate parcel over the old road and right-of-way that ran parallel to the common property line between Aaron Green and the subdivision.*

In accordance with the practice at that time, the existing old right-of-way was placed on a separate parcel to keep it off the proposed lots. During the Final Plans Review of the subdivision, the right-of-way parcel was included with the open space parcel for use as a pedestrian pathway. The open space areas, as well as the fifteen-feet-wide parcel, are now owned by the High Ridge Homeowners Association.

There was other evidence also presented relating to preexisting rights of ways from which inferences could be made that, in fact, no error (as suggested by the Greens) had occurred. There was apparently a law in effect at the time that the High Ridge plat was recorded that prohibited the platting of a subdivision street over a pre-existing recorded right of way. Because a pre-existing right of way was believed to exist, High Ridge was not permitted to extend High Ridge Drive to the property line. That law apparently was later changed. Thus, appellant contends the termination short of the property line could not have been a mistake because, in the first instance, it was required by statute. At the Planning and Zoning Commission's November 19, 1991 meeting, the Commission made the following decision after considering Waldron's Report and arguments made by the Greens' representative:

Decision:

> The Commission . . . approves the concept plan as presented and as conditionally recommended. . . . In taking this action, the Commission on review finds, that the road in question as detailed and approved, on the approved preliminary subdivision plan was clearly laid out to extend to and intersect with the adjoining property line of the Aaron Green property; and further that the final plat prepared for record, deviated from the approved plan and was therefore in error in that it did not reflect what had been intended and approved (the eventual extension of the street into adjoining property).

The County Commissioners met on February, 27, 1992, and voted "to condemn such property as necessary to implement the Planning and Zoning Commission recommendation with respect to the construction of a street *to serve the Aaron Green Subdivision* which will intersect with an existing culdesac in High Ridge Subdivision." (Emphasis added.) The Commissioners then quoted the Planning and Zoning Commission's recommendation and decision in its entirety. Appellant notes that the County Commissioners addressed only the alleged error to which the Planning and Zoning Commission referred: "It is completely silent as to any statement of public purpose served by condemning [appellant]'s property."

On July 27, 1992, the County Commissioners filed a Complaint for condemnation in respect to appellant's land. On November 17, 1992, the trial court granted appellant's Motion for Separate Trial of Issues of Law. This allowed for the bifurcation of the Commissioners' authority to condemn from the remaining issues. Trial

was held on December 2, 1992. On December 16, 1993, the trial court found in favor of the County on its right to exercise eminent domain against the subject property. A hearing regarding appellant's damages was then scheduled. On June 28, 1994, a stipulation of fair market value by the parties was presented to the trial court and judgment in accord therewith was entered.[2] Appellant filed this timely appeal therefrom. Ultimately, the County Commissioners chose not to participate in the appeal. The Greens were permitted to intervene.

I.

The Constitutionality of the Condemnation

We answer appellant's first question in the affirmative and shall reverse the judgment of the Circuit Court for Carroll County. In light of this decision, we do not address the remaining issues or propriety *vel non* of the County Commissioners' Election to Abandon and the Greens' Motion to Intervene.

Maryland Rule U6 states that

> A proceeding for condemnation shall be commenced by filing a petition complying with Rules 2-303 through 2-305 as to form and contents and containing:
>
> . . . .
>
> (4) A statement of the purposes for which the property is sought to be condemned.

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[2] Said judgment was paid to the court on June 30, 1994, resulting in the County's acquisition of title to the property in question. The taking was, thus, technically complete.

"The reason for this is plain. Without such a statement courts and litigants would not be able to determine whether a condemnation was proposed for a public purpose." *Prince George's County v. Beard*, 266 Md. 83, 96 (1972). In the case *sub judice*, the County provided the following averment in its Complaint:

> 4. That the property . . . is needed for the proposed future public road. . . .

While this bald assertion may appear to satisfy technically the requirements of Rule U6, it does not provide a basis upon which meaningful judicial review of the constitutionality of the condemnation proceeding may be conducted. *See Beard*, 266 Md. at 95-96 ("A legislative body can not make a particular use either public or private merely by so declaring it, for if it could do so the constitutional restraint [imposed by Maryland Constitution, Art. III § 40] would be utterly nugatory." (citation omitted)). A mere recital that a proposed property is needed for a particular public use is insufficient when dealing with the deprivation of private property rights. Indeed, the County provides no explanation other than the aforementioned allegation to substantiate its conclusory and self-serving declaration of the need for a "proposed future public road." One is left to wonder whether the use is buttressed by increased traffic flow, changing traffic patterns, and the like. "For us to hold on such a record that a public use has been established would be to hold, in essence, that a public body may condemn private property for any purpose which suits its convenience. . . . " *Id.* at 96. Despite having a "full opportunity to spell out the use it propose[d] making of the property *and all the details surrounding that use*," *id.*

(emphasis added), the County Commissioners failed to do so. "In order for a court to perform its judicial function," the *Beard* Court stated, *"the [proposed] plan should . . . be comprehensive." Id.* (emphasis added). Based on our review of the record, we find no such plan of public use, much less a detailed one. Moreover, we find no evidence to support a finding that *any* public use could be gleaned from a condemnation of the property at issue. We explain, but first we address the legal standards that apply in respect to condemnation in Maryland.

The power to exercise eminent domain is indeed an awesome one that must be adequately bridled lest "the rights of property [be] . . . solely dependant upon the will of a legislative body, without restraint." *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537, 559 (1873), *appeal dismissed*, 40 Md. 425 (1874). The exercise of eminent domain is predicated upon due process of law. A taking for a use that is not imbued with a public interest "is such a violation of the basic and essential features of constitutional government that it amounts to a taking without due process of law. . . . " 2A Nichols, *The Law of Eminent Domain* § 7.01[3] (3d ed. rev. 1990) (footnote omitted).

In the nascent stages of our nation's development, uncompensated takings for any use to which the government saw fit to put the property *were* sanctioned. "[T]he constitutional framers of post-colonial days perceived uncompensated takings as feudal redistributions of private property back to the government, *i.e.*, the king." *Offen v. County Council*, 96 Md. App. 526, 548 n. 7 (1993), *aff'd in part, rev'd in part*, 334 Md. 499 (1994). Indeed, "[i]t was not until the introduction of improved methods of

transportation operated by private corporations and the general extension of the activities of municipal governments . . . that the limits of the power of eminent domain with respect to the purposes for which it could lawfully be exercised" arose. Nichols, *supra* § 7.01. Even then, takings for the benefit of private interests were not expressly prohibited; "it had apparently never occurred to anyone that it might be attempted." *Id.*

> After it became . . . accepted . . . that the courts could not set aside an act of the legislature unless it violated some specific provision of the constitution, . . . [t]he theory . . . put forward [to justify a refusal to permit a taking for private use] was that the . . . "eminent domain" clause[ ], by [negative] implication prohibited the taking of property for uses not public with or without compensation.

Id. § 7.01[2].[3]

The "Takings" Clause first appeared in the Federal Constitution upon the ratification of the Fifth Amendment on December 15, 1791. That clause only permits, provided that due process is afforded, "private property [to] be taken *for public use. . . .* " (Emphasis added.) U.S. Const. amend V. It is thus a long standing constitutional principle that private property may not be taken for other than a public use, U.S. Const. amend. V and XIV; Md. Const., Art. III § 40; Md. Declaration of Rights Art. 23; *Mayor of Baltimore v. Chertkof*, 293 Md. 32, 42 (1982); *Shreve*

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[3] "Maryland was one of only three states that had a Takings Clause in its first constitution." *Offen v. County Council*, 96 Md. App. at 526, 548 n. 7 (1993), *aff'd in part, rev'd in part*, 334 Md. 499 (1994).

v. Mayor of Baltimore, 243 Md. 613, 618 (1966); *Webster v. Susquehanna Pole Line Co.*, 112 Md. 416, 426 (1910); *Van Witsen v. Gurman*, 79 Md. 405, 410 (1894); 26 Am. Jur. 2d *Eminent Domain* § 25 (1966); 29A C.J.S. *Eminent Domain* § 29a (1965), and may not be done without providing compensation therefor. Authorities differ, however, as to the precise meaning of "public use." "However 'public use' may be defined, for a use to be public it is not necessary that the entire community or any considerable portion of it should enjoy it. . . . [I]t is enough if the people of a particular locality receive the benefit." Nichols, *supra* § 7.07 (citing *Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171 (1975) and *Cox v. Revelle*, 125 Md. 579 (1915)) (footnotes omitted). Despite this uncertainty, however, it remains clear that a governmental entity's ability to condemn property is limited in scope to the nature of the public use supporting it.

The exercise of eminent domain must also be grounded upon public necessity. 26 Am. Jur. 2d *Eminent Domain* § 2 (1966). It should only be exercised to the extent actually found necessary, *Webster*, 112 Md. at 431-32, although absolute necessity is not required;[4] *Washington Suburban Sanitary Comm'n v. Santorios*, 234 Md. 342, 346 (1964); *Johnson v. Consolidated Gas, Elec. Light & Power Co.*, 187 Md. 454, 462 (1947); *Levitsky v. Prince*

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[4] Indeed, "the decision . . . as to the public necessity for taking particular property is not subject to judicial review unless [the] decision is so oppressive, arbitrary or unreasonable as to suggest bad faith." *Murphy v. State Roads Comm'n*, 159 Md. 7, 15 (1930).

George's County, 50 Md. App. 484, 488 (1982). "The necessity that the use shall be public excludes the idea that property may be taken under semblance of public use and ultimately conveyed and appropriated, or diverted, to a private use."[5] 29A C.J.S. *Eminent Domain* § 29a (1965) (footnote omitted).

The legislature, however, is not held to a strict public use, public necessity standard *so long as the public use and necessity is legitimate*. "[T]he words 'public use,' as written in our Constitution, mean use by the public." *Riden v. Philadelphia, Baltimore & Washington R.R. Co.*, 182 Md. 336, 342 (1943). " '[T]he test whether a use is public or not, is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid, or denied, or withdrawn at the pleasure of the owner.' " *Anne Arundel County v. Burnopp*, 300 Md. 343, 350 (1984) (quoting *Arnsperger v. Crawford*, 101 Md. 247, 253 (1905)). *See also Webster*, 112 Md. at 426. "[M]erely because private businesses or private persons will also receive benefit from the condemnation does not destroy the public character of the action." *Collington Crossroads*, 275 Md. at 187. *See also Chertkof*, 293 Md. at 43; *Dobler v. Mayor of Baltimore*, 151 Md. 154, 165 (1926); Nichols, *supra* § 7.08; 29A C.J.S. *Eminent Domain* § 29a (1965) ("An ulterior public advantage may justify a comparatively insignificant taking of private property for

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[5] The necessity that serves as the basis for the taking must be judged as of the time the action to condemn was undertaken, not by a later result. *Rollins Outdoor Advertising, Inc. v. State Roads Comm'n*, 60 Md. App. 195, 201 (1984).

what, in its immediate purpose, is a private use." (footnote omitted)). Moreover, the public character *vel non* of the use to which the condemned property will be put is not affected by the fact that, although the public may have a right to use it, it seldom does. *Burnopp*, 300 Md. at 350. *See also* 26 Am. Jur. 2d *Eminent Domain* § 46 (1966) ("The public character of a road does not depend on the degree of public necessity or convenience that requires it, the extent to which the public uses it, or the number of persons that it accommodates." (footnote omitted)); Nichols, *supra* § 7.22[1] ("If a road is to be open for public travel the purpose for which the public may wish travel is not material, and land may be taken by eminent domain for a road which is intended solely for driving for pleasure . . . or to furnish a view of beautiful natural scenery." (footnote omitted)). There must, however, be a *bona fide* public necessity for the public use and that use and necessity must be evidenced by more than *bald* assertions.

Moreover, whether the use contemplated by the condemnation is public or private is a matter for the courts to determine. *Chertkof*, 293 Md. at 43; *Beard*, 266 Md. at 95; *Perellis v. Mayor of Baltimore*, 190 Md. 86, 93 (1948); *Riden*, 182 Md. at 340; *Pitznogle v. Western Maryland RR Co.*, 119 Md. 673, 678 (1913), *aff'd*, 123 Md. 667 (1914); *Van Witsen*, 79 Md. at 410; *New Central Coal*, 37 Md. at 560; 29A C.J.S. *Eminent Domain* § 30 (1965). A use cannot be made public by mere declaration of the Legislature. *Chertkof*, 293 Md. at 43; *Beard*, 266 Md. at 96 (citing *Arnsperger v. Crawford*, 101 Md. 247 (1905)); *Riden*, 182 Md. at 340; *Pitznogle*, 119 Md. at 678; *Van Witsen*, 79 Md. at 410. In reviewing a public body's decision to condemn private property,

courts are limited in the scope of their scrutiny. Indeed, it lies in the discretion of the Legislature "to determine to what extent, on what occasions, and under what circumstances th[e] power shall be exercised. The Courts have no right to review or control its decisions on these points. . . . " *Van Witsen*, 79 Md. at 411-12. "Although the legislature, *in the first instance*, has the power to determine the question of public use, it has no power to determine *finally* the extent of its own authority over private property. The question whether a use . . . is really public is ultimately a judicial one." Nichols, *supra* § 7.16 and Maryland cases cited therein (footnotes omitted). The public use *vel non* for which the private property is sought is a question for the determination of the court, *Beard*, 266 Md. at 95,[6] " ' . . . to be controlled by the facts, circumstances and necessities of th[e] case.' " *Collington Crossroads*, 275 Md. at 184 (quoting *Pitznogle*, 119 Md. at 678). *See also* Nichols, *supra* § 7.16[1].

When the condemnation centers around the use of a street or road, the extension of which is sought by a private individual or entity, the inquiry remains the same – public interest must permeate the taking or it will fail for want of validity. While "[t]he act of opening, widening and closing streets, is an exercise of the right of *eminent domain*," *State ex rel. McClellan v. Graves*, 19 Md. 351, 369 (1863), it *must* be done in conjunction with public

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[6] *See also Mayor of Baltimore v. Chertkof*, 293 Md. 32, 43 (1982); *Perellis v. Mayor of Baltimore*, 190 Md. 86, 93 (1948); *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537, 560 (1873).

purpose and necessity. With these considerations in mind, we turn to the case *sub judice*.

Appellant challenges the validity of the condemnation, stating that its "truly private purpose is overwhelming." It is for this reason that appellant claims that the County Commissioners' action is constitutionally improper. We agree. In neither the legislative proceedings authorizing the filing of the Complaint for Condemnation nor the Complaint itself does the County, other than by a bald claim of public purpose, proffer any public purpose objectives or necessity or proffer any *evidence* of any such purpose or necessity to justify condemnation of the private pedestrian path located in High Ridge Estates. There is nothing to indicate how the public will benefit from extension of High Ridge Drive *per se* or how the extension inures to the public benefit. Moreover, given the evidence that development along a route other than High Ridge Drive would prove very costly for the Greens, that the Greens precipitated the condemnation for their private purposes, and that there is a virtual absence of any reasons providing a foundation for the stated public purpose, or evidence of same, we perceive the condemnation to have been clearly intended to inure solely to the benefit of the Greens, in derogation of the very well settled principle that, absent a *bona fide* public purpose for which the condemned land is sought, property may not be subject to the exercise of eminent domain.

In so deciding, we are cognizant of several cases that, though they appear factually close, are inapposite. In *Prince George's County v. Beard, supra*, 266 Md. 83, the Court of Appeals was faced with a similar set of circumstances. At issue was a quantity of real property sought to

be condemned for use as an airport facility. Following enactment by the Maryland General Assembly of enabling legislation properly condemning the land, a County ordinance declared the effort abandoned; later efforts to reacquire the land through eminent domain were found to be lacking in the requisite public nexus to support the taking. The appellee challenged the validity of the condemnation petition on constitutional grounds, alleging that its sole purpose was private in nature. Following its decision to remand for further proceedings as to the inclusion *vel non* of the project within the capital budget adopted by the County Council, the Court addressed the eminent domain facet of the case. The Court remanded on this issue as well, as it was unable to discern from either the petition or the record the public use for which the land was sought; "even the County Executive is unable to say what use will be made of the property." *Id.* at 96. The Court went on to reject any invitation to speculate and hold that a public use had been established on such a deficient record; to do so "would make the rights of property solely dependent upon the will of a legislative body without restraint. Such is not the law." *Id.*

In the case *sub judice,* we perceive a conspicuous deficiency in the record. There is no evidence in the record supporting the County's declaration of public purpose. The evidence is not weak; it is simply not there. The record is replete with support for the fact that condemnation in the instant case inures solely to the benefit of the Greens and was so intended.

We find *Anne Arundel County v. Burnopp, supra,* 300 Md. 343, to be equally unavailing as well as factually

distinguishable. There, the Court of Appeals stated that the fact that a piece of land sought to be condemned is a dead end or a cul de sac does not prevent it from being for a public use. Quoting Nichols, *supra* § 7.22[1], the Court said: " '[I]t is no legal objection that a proposed highway will be a *cul de sac*, or that it will lead to the residence or place of business of but one individual, for the public may desire to visit or do business with him. . . . ' " 300 Md. at 352. Be that as it may, the public use in *Burnopp*, unlike the case *sub judice*, was clearly established by legislative enactment, was described in the petition, and a public purpose could, at least, be inferred from the evidence.

The Commissioners' decision to initiate condemnation in the case at bar was clearly and solely made to enhance the private interests of the Greens. In essence, the County was using its powers of eminent domain to give Green access to and through appellant's private property. That is an inappropriate use of the condemnation power. The County's action was thus oppressive, arbitrary and unreasonable. The trial court erred in upholding the condemnation. On the basis of the record in the case *sub judice*, no rational inferences of a genuine public purpose are possible.

We conclude and acknowledge that the Commissioners' attempt to abandon the proceeding was a belated good faith attempt to rectify that which should not have been commenced in the first instance. Thus, no costs shall be assessed against the County Commissioners of Carroll County, Maryland. All costs shall be assessed against the Greens.

JUDGMENT REVERSED; COSTS TO BE PAID BY THE INTERVENORS/APPELLEES (GREENS).

APPENDIX D

AARON E. GREEN and RUTH E. GREEN	*	In the Court of Appeals of Maryland
v.	*	No. 125
HIGH RIDGE ASSOCIATION, INC.	*	September Term, 1995

ORDER

The Court having considered the motion for reconsideration filed in the above-captioned case, it is this 23rd day of July, 1997,

ORDERED, by the Court of Appeals of Maryland that the motion be, and it is hereby, denied.

/s/ Robert M. Bell
Chief Judge

APPENDIX E

Planning Commission Minutes of Nov. 19, 1991

Special Reports:

a. NC-91-020 Aaron Green Property – Concept Plan

b. 350-C-32 River Downs – Phasing Plan and Open Space Plan

c. Truitt Property Conceptual Plan

A. NC-91-020, AARON GREEN PROPERTY, CONCEPT PLAN

LOCATION: At the intersection of High Ridge Drive off Maryland Route #32

OWNER: Aaron Green
2907 Bird View Road
Westminster, MD 21157

DEVELOPER: Same

ENGINEER: KCI Technologies, Inc.
439 East Main Street
Westminster, MD 21157

ZONING: Agricultural

ACREAGE: 135 Acres

Bruce Waldron presented the background.

Background:

The subject property is located in the Agricultural Zone. The property is approximately 135 acres and is comprised of 11 separate parcels or tracts. The total lot yield of the plan, as submitted, is 21 lots with 1 remainder. The property has access from Bird View Road

through a 16 feet +/- wide in-fee strip. In addition, the property has in-fee access to Nottingham Road and a right-of-way to High Ridge Drive, both which are in the adjacent High Ridge Subdivision.

A Concept Plan was submitted on September 30, 1991. The plan proposes to extend High Ridge Drive into the Aaron Green Property. The proposed plan was reviewed by the various County and State agencies in the usual Subdivision Process. The existing road widths and lengths, even with the proposed extension, meet the minimum requirements as prescribed by Public Works. The site has adequate areas for Storm Water Management, and the proposed grades are well within the acceptable standards.

The lots themselves have been clustered and located on the property to allow a large remaining portion that will allow the owner to continue a farming operation. As such, the plan is in compliance with the Rural Development Guides and Standards. As a result of the Concept review, the plan, as submitted, would receive a favorable recommendation with the resolution of a question on in-fee frontage to High Ridge Drive.

Development of the plan, as proposed, will require the owner to demonstrate accessibility to High Ridge Drive. At present, there exists a fifteen-feet-wide parcel that runs between High Ridge Estates and the Aaron Green Property. This parcel prevents the Aaron Green Property from having in-fee access onto High Ridge Drive.

The approved Preliminary Plan of High Ridge Estates shows, by the absence of a permanent cul-de-sac, that the

roads were intended to provide access for future development into adjacent properties. These temporary cul-de-sacs were meant to be removed as the roads were extended. The approved Preliminary Plan of High Ridge shows a separate parcel over the old road and right-of-way that ran parallel to the common property line between Aaron Green and the subdivision.

In accordance with the practice at that time, the existing old right-of-way was placed on a separate parcel to keep it off the proposed lots. During the Final Plans Review of the subdivision, the right-of-way parcel was included with the open space parcel for use as a pedestrian pathway. The open space areas, as well as the fifteen-feet-wide parcel, are now owned by the High Ridge Homeowners Association.

The developer has made attempts to acquire the necessary land from the Homeowners Association for access to High Ridge Drive. The Association has declined the owner/developer offers. The owner/developer has also requested the County Commissioners to condemn the property. The County Commissioners declined to take any action in the absence of a subdivision plan.

Recommendation:

The staff recommends acceptance of the Concept Plan. However, prior to the Preliminary Plan approval, the owner must gain in-fee access to High Ridge Drive or demonstrate the ability to build a County road across the fifteen-feet-wide Homeowners Association strip to High Ridge Drive.

Decision:

The Commission, on motion of Mr. Fisher, seconded by Mr. Pecoraro and carried, approved the concept plan as presented and as conditionally recommended above by the staff. In taking this action, the Commission on review finds, that the road in question as detailed and approved, on the approved preliminary subdivision plan was clearly laid out to extend to and intersect with the adjoining property line of the Aaron Green property; and further that the final plat prepared for record, deviated from the approved plan and was therefore in error in that it did not reflect what had been intended and approved (the eventual extension of the street into adjoining property).

* * *

APPENDIX F

AARON GREEN HIGH RIDGE SUBDIVISION:

Upon motion of Commissioner Gouge, second by Commissioner Dell, the Board voted to condemn such property as necessary to implement the Planning and Zoning Commission recommendation with respect to the construction of a street to serve the Aaron Green Subdivision which will intersect with an existing culdesac in High Ridge Subdivision. The Planning Commission recommendation is as follows: "The staff recommends acceptance of the Concept Plan. However, prior to the Preliminary Plan approval, the owner must gain in-fee access to High Ridge Drive or demonstrate the ability to build a County road across the fifteen-feet-wide Homeowners Association strip to High Ridge Drive. The Planning Commission Decision is as follows: The Commission, on motion of Mr. Fisher, second by Mr. Pecoraro and carried, approved the concept plan as presented and as conditionally recommended above by the staff. In taking this action, the Commission on review finds, that the road in question as detailed and approved, on the approved preliminary subdivision plan was clearly laid out to extend to and intersect with the adjoining property line of the Aaron Green property; and further that the final plat prepared for record, deviated from the approved plan and was therefore in error in that it did not reflect what had been intended and approved (the eventual extension of the street into adjoining property)." Mr. Lippy cast a dissenting vote.

APPENDIX G

THIS CONCILIATION AGREEMENT made this 17th day of February, 1995, by and between **THE COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND,** a body corporate and politic of the State of Maryland (hereinafter **"County"**) and **HIGH RIDGE ASSOCIATION, INC.,** a body corporate of the State of Maryland (hereinafter **"High Ridge"**).

WHEREAS, County sought to acquire a strip of land from High Ridge, containing 750 square feet, more or less, and being a portion of Parcel 'A' Common Open Space on a plat entitled "High Ridge Section 2", Plat 2, recorded in Carroll County Land Records, Plat Book No. 15, Page No. 47; and

WHEREAS, suit was instituted in the Circuit Court of Carroll County, Maryland by the County to acquire the property by eminent domain in Case No. C-92-13555; and

WHEREAS, the case was tried before the Honorable Luke K. Burns on December 2, 1992, and by Order dated December 15, 1993, Judgment was entered in favor of County against High Ridge on the issue of the County's right to condemn the property; and

WHEREAS, thereafter the parties stipulated to the value of the property at the hearing convened to determine such issue and an Inquisition was rendered in favor of County against High Ridge Defendant in the sum of One Thousand Dollars ($1,000); and

WHEREAS, High Ridge has consistently contested the County's right to acquire the subject property; and

WHEREAS, the Inquisition was duly recorded in the Land Records of Carroll County in Liber L.W.S. No. 1612, folio 127 &c.; and

WHEREAS, High Ridge noted a timely appeal to the Court of Special Appeals of Maryland; and

WHEREAS, the parties have now reached an agreement and wish to dismiss the appeal and resolve their differences.

NOW, THEREFORE, the parties hereto in consideration of the mutual covenants and promises recited herein, agree as follows.

(1) County shall, upon the signing of this Agreement, file a written election to Abandon the Acquisition of the strip of land pursuant to Maryland Rule U-26.

(2) Subsequent to the filing of such election to abandon the acquisition, any funds paid into the Clerk of Court shall be returned to the County. Each party to be responsible for costs it incurred.

(3) High Ridge shall dismiss its appeal before the Court of Special Appeals.

(4) High Ridge agrees that it shall not be entitled to recover from the County any legal, appraisal, engineering, or any other fees or costs actually incurred by it because of the condemnation proceeding, and hereby releases and discharges for and on behalf of the Association, its agents, members, and employees, the County Commissioners of Carroll County, its employees, agents, successors, and assigns from any and all actions and causes of action, claims and demands whatsoever, whether known or unknown, whether founded in fact or

law, and of and from any and all manner of suits, debts, dues, sums of money, accounts, bills, controversies, covenants, agreements, promises, damages, judgments, claims, and demands whatsoever in law or in equity, resulting or arising from or in any way associated with suit brought by the County Commissioners of Carroll County against High Ridge Association and docketed in Case No. C-92-13555.

(5) This writing represents the entire agreement among the parties and may be modified only by another writing signed by all parties of the agreement.

(6) This Agreement shall become effective immediately upon signing and dating by all parties to the Agreement.

HIGH RIDGE ASSOCIATION, INC.
a body corporate of the
State of Maryland

/s/ E. Davis Bond, Jr.
President

/s/ Joseph A. Zenghi
Treasurer

"High Ridge"

February 7, 1995
Date:

THE COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND, a body corporate and politic of the State of Maryland

ATTEST:

/s/ Shawn D. Reese
Shawn D. Reese,
Clerk

/s/ Richard T. Yates (Seal)
Richard T. Yates,
President

/s/ W. Benjamin Brown (Seal)
W. Benjamin Brown,
Vice-President

_____ (Seal)
Donald I. Dell, Secretary

"County"

Approved for Legal Sufficiency:

/s/ Isaac Menasche
Isaac Menasche
Assistant County Attorney

(2)

Supreme Court, U.S.
FILED
NOV 19 1997
CLERK

No. 97-701

In The

Supreme Court of the United States

October Term, 1997

HIGH RIDGE ASSOCIATION, INC.

Petitioner,

v.

AARON E. GREEN AND RUTH E. GREEN

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

RESPONDENTS' BRIEF IN OPPOSITION

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MD. CODE ANN., Article 66B, Section 5.03(a) and 5.04 4

5.03(a) "*Preparation; contents generally.* – Before exercising the powers referred to in § 5.02, the planning commission shall prepare regulations governing the subdivision of land within its jurisdiction. Those regulations may provide for the adequate control of shore erosion; the control of sediment and the protection from flooding; the proper arrangement of streets in relation to other existing planned streets and to the master plan; the adequate and convenient placement of public school

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sites and of open spaces for traffic, utilities, access of fire-fighting apparatus, recreation, light and air and the avoidance of congestion of population, including minimum width and area of lots." . . .

5.04 "*Plat approval and disapproval generally.* – The planning commission shall approve or disapprove a final plat, if all subdivision regulations have been complied with, within thirty (30) days after the submission thereof to it; otherwise such plat shall be deemed to have been approved and a certificate to that effect shall be issued by the commission on demand. Provided, however, that the applicant for the commission's approval may waive this requirement and consent to an extension of such period. The ground of disapproval of any plat shall be stated upon the records of the commission. Every plat approved by the commission shall by virtue of such approval, be deemed to be an amendment of or an addition to or a detail of the plan and a part thereof. Approval of a plat shall not be deemed to constitute or effect an acceptance by the public of any street or other open space shown upon the plat. The planning commission may, from time to time, recommend to the local legislative body amendments of the zoning ordinance or map or additions thereto to conform to the commission's recommendations for the zoning regulation of the territory comprised within approved subdivisions. The commission shall have the power to agree with applicant upon use, height, area or bulk requirements or restrictions which are designed to promote the purposes of the zoning ordinance of the

TABLE OF AUTHORITIES – Continued

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jurisdiction. Such requirements or restrictions shall be stated upon the plat prior to the approval and recording thereof and shall have the same force of law and be enforceable in the same manner and with the same sanctions and penalties and subject to the same power of amendment or repeal as though set out as a part of the zoning ordinance or map of the jurisdiction. (An. Code, 1951, § 27; 1939, § 27; 1933, ch. 599, § 18; 1961, ch. 272; 1970, ch. 672, § 1.)

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ARGUMENT

A. PETITIONER'S MISSTATEMENT OF FACTS

The Petitioner's version of the facts as set forth in its Petition for Writ of Certiorari is so biased and incomplete that Respondents will simply restate the material facts as substantiated by the record of the case and adopted by the lower Courts.

The Respondents, the Greens, own a farm in Carroll County comprised of approximately 135 acres. A portion of the farm is eligible for residential development at the eastern termination of an existing County-owned road known as High Ridge Drive. The Petitioner is a home-owner's association which apparently objects to any such development. On November 19, 1991, the Carroll County Planning and Zoning Commission confirmed that the Greens proposed subdivision of thirteen (13) lots of about 1-2 acres each in the Agricultural Zoning District met the applicable planning and zoning requirements. A rectangular strip of land owned by Petitioner and ultimately condemned, which is fifteen (15) feet by fifty (50) feet in size, lies in the path of High Ridge Drive which was intended to be extended into the Green property. Unfortunately, this small strip was not included as part of High Ridge Drive when the existing High Ridge subdivision was recorded in the 1970s and it was not dedicated to the County as was the remainder of High Ridge Drive. As a result there is a small fifteen (15) feet wide gap between the Green property and existing High Ridge Drive.[1] The

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[1] This small 750 square feet rectangular strip is already encumbered by a right-of-way of record which includes a

terminus of High Ridge Drive was constructed as a *temporary* cul-de-sac in the 1970s so that it could be removed and extended in the future.

When the Greens decided to develop this portion of their property they discovered the problem and raised the issue with Carroll County. The County Commissioners, the executive body of the County, then met with members of the Petitioner, i.e. members of the objecting homeowner's association, and referred the matter to the Carroll County Planning and Zoning Commission for study. The planning staff pointed out that the original plan in the 1970's showed "by an absence of permanent cul-de-sac, that the roads were intended to provide access for future development into adjacent properties". Petitioner's representatives also participated in the Planning Commission's deliberations. Upon considering a detailed Special Report from its staff and hearing from the interested parties, the Planning and Zoning Commission found that the gap was due to an error in the approval of the record plat for the High Ridge Subdivision and that High Ridge Drive was in fact intended to be extended into the Green property. The Planning Commission minutes summarize its holding as follows:

> " . . . The Commission, on motion of Mr. Fisher, seconded by Mr. Pecoraro and carried, approved

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driveway actively used by the Greens. The Association never had the right to use this strip of land in any way inconsistent with the existing right-of-way. Therefore, its only use was for access to the Association's remaining lands. If converted to a public roadbed, this access will go unhindered and may even be improved.

> the concept plan as presented and as conditionally recommended above by the staff. In taking this action, the Commission on review finds, that the road in question as detailed and approved, on the approved preliminary subdivision plan was clearly laid out to extend to and intersect with the adjoining property line of the Aaron Green property; and further that the final plat prepared for record, deviated from the approved plan and was therefore in error in that it did not reflect what had been intended and approved (the eventual extension of the street into adjoining property)."

Even the Petitioner's expert at trial agreed that the road was planned to be extended into the Green farm at the location shown on the record plat and that the Greens' subdivision plan was a good one.

The findings of the Planning Commission were promptly forwarded to the Carroll County Commissioners and considerable deliberations ensued until they voted to condemn on February 27, 1992, some thirteen (13) months after this matter was first brought to them.

The Commissioners considered the findings of the Planning and Zoning Commission and further found that alternative access to the property would involve one-half (1/2) mile more public street which would increase the cost of maintenance to the County and ultimately to the taxpayers. The trial judge specifically noted this rationale in his written decision. (Petition, Appendix B-5). The record reflects that the Carroll County Commissioners acted: a) to carry out the intent of the Master Plan by establishing a link for the extension of a planned public road; b) to correct the error in the adjacent subdivision

approval which created the spite strip; c) to avoid a haphazard extension of public streets[2] into the Green farm which would be longer and more costly to plow and maintain [Commissioner Dell stated that he viewed the site and felt that the Nottingham Road access was ill-advised, in part, because it involved one-half mile more street which would increase cost of lots and maintenance costs to County]; d) to assure that new residences would be served by a County-owned road, constructed to the latest standards, open to the general public and maintained by the County; e) to maintain the integrity of the County's rural development guidelines; f) to facilitate the preservation of open space and farmland by clustering lots along this short extension of an existing road; and g) to facilitate the clustering of homes away from environmentally sensitive areas.

Unable to acquire the strip of land by agreement, the County Commissioners filed a Complaint in the Circuit Court for Carroll County on July 27, 1992 to condemn it under the rules governing such takings in Maryland. The trial Court found the condemnation to be proper and entered judgment accordingly. The County posted the One Thousand Dollars ($1,000.00) in damages for the land as stipulated between it and Petitioner[3] and the final

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[2] MD. CODE ANN., Article 66B, Section 5.03(a) requires planning of street systems upon subdivision approval. Section 5.04 effectively makes the 1970's street layout at the High Ridge Subdivision a "detail" of the Carroll County Master Plan, and "a part thereof."

[3] Petitioner was entitled at trial to show adverse or oppressive impacts from the taking which may have been compensable, but it offered no such evidence.

recordation occurred on June 30, 1994, whereby the taking occurred under Maryland law. Petitioner appealed the trial Court's ruling to the Maryland Court of Special Appeals, the State's intermediate appellate Court. However, as the Maryland Court of Appeals noted (Petition, Appendix A-5), a new Board of County Commissioners was elected while the appeal was pending and the County then unlawfully sought to abandon the taking on February 21, 1995. The Greens filed a Motion to Strike the abandonment. The Court of Special Appeals disallowed the County's wrongful attempt to abandon under Maryland law which prohibits abandonment once the taking has occurred; but the Court denied the Green's motion to intervene as a matter of right at that time and withheld action on the issue of permissive intervention. This is explained in its Opinion and Order dated March 24, 1995 (Appendix A). Once the County expressed its intent not to participate in the appeal, the Court granted the Greens' request for permissive intervention under the Maryland Rules by Order dated May 8, 1995. The Greens' Preliminary Plan of subdivision had been approved by Carroll County on November 18, 1994, i.e., after the taking occurred. The taking had resolved the issue of road frontage for the subdivision.

After the Court of Special Appeals reversed the trial Court on the merits, the Court of Appeals granted the Greens' Petition for Writ of Certiorari and ultimately restored the judgment of the trial Court and upheld the taking. The appropriateness of the taking was the only issue before the Court. The State's highest Court specifically denied Petitioner's cross-petition for Writ of Certiorari on the issue of the Greens' permissive

intervention. The Petitioner did not seek review of the lower Court's determination that the County was barred by State law from abandoning the condemnation.

B. THE CONDEMNATION WAS NOT UNCONSTITUTIONAL

The written opinion issued by the Maryland Court of Appeals (Petition, Appendix A) is exhaustive in its recitation of the Maryland appellate decisions in this area. The Court found a very well-settled body of case law and had no problem in validating the condemnation for a public road.

Likewise, the law in this area under the Fifth Amendment appears to be well-settled by this Court. In *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L. Ed. 27 (1954), the Court reviewed the Public Use Clause of the Fifth Amendment made applicable to the States through the Fourteenth Amendment as it applied to District of Columbia Redevelopment Act of 1945. The Act permitted the use of eminent domain power to redevelop slum areas for the possible sale or lease to "private" interests. In discussing whether such takings were for "a public use", the Court stated:

> "We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete

> definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms wellnigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved. (citations omitted)." 348 U.S. at 32; 75 S.Ct. at 102.

In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed. 2d 186 (1984), the Supreme Court defined the role of the Courts in reviewing a legislative judgment of what constitutes public use. The issue in *Midkiff* was the constitutionality of Hawaii Land Reform Act of 1967 (Act), which created a land condemnation scheme whereby title to real property is taken from lessors and sold to *"private"* lessees in order to reduce the concentration of land ownership. In upholding the Act, the Court stated:

> "The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers. There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court, in *Berman*, made clear that it is 'an extremely narrow' one. The Court, in *Berman*, cited with approval the Court's decision in *Old Dominion Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 40, 70, L.Ed. 162 (1925), which held that deference to the legislature's 'public use' determination is

> required 'until it is shown to involve an *impossibility.*' The Berman Court also cited to *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 718, 90 L.Ed. 843 (1946), which emphasized that '[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields.' In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.' *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680, 16 S.Ct. 427, 429, 40 L.Ed. 576 (1896) . . . "Where the exercise of the eminent domain power is rationally related to a *conceivable* public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause (emphasis added)" 104 S.Ct. at 2329.

This judicial test was again recognized more recently in *National Railroad Passenger Corporation v. Boston and Maine Corporation*, 503 U.S. 407, 422, 112 S.Ct. 1394, 1404 (1992).

C. RESPONDENTS' INTERVENTION IN STATE COURT DOES NOT PRESENT FEDERAL QUESTION

The Greens were granted permissive intervention by the Maryland Court of Special Appeals under the Maryland Rule of Procedure 2-214 after the County unlawfully attempted to abandon the completed condemnation and then declined to further participate in the appeal.

By allowing the Greens to participate the Court was able to ensure that both sides of the issue would be fully represented. At this point, the Greens had a keen interest in the outcome due to their detrimental reliance on the completed taking when processing and gaining County approval of their subdivision plan. In its opposition to the Greens' motion to intervene in the lower Court, the Petitioner never raised any constitutional ground for its objection to the intervention as it does now. Petitioner addressed this issue twice in written pleadings in the Court of Special Appeals and again in its failed Cross-Petition for Writ of Certiorari in the Court of Appeals without ever suggesting any constitutional issue. Therefore, Petitioner is barred from raising this issue now.

In any event, Petitioner cites *United States v. 36.96 Acres of Land*, 754 F.2d 855 (1985) in support of its position. However, the procedural approach to an issue on intervention under the Federal Rules, though it may be instructive to a state court, is neither mandated on the state court nor necessarily indicative of the constitutional parameters applicable to the issue. Furthermore, the Court, in *United States v. 36.96 Acres of Land, supra*, denied intervention as a matter of right just as the Maryland Court did in this case. The Court went on to state that permissive intervention under Federal Rule 24 is wholly discretionary with the lower court and let the decision of the lower court to deny intervention in that case stand where the condemning authority's initial action to condemn was still pending.

This issue is beyond the Court's jurisdiction and permissive intervention was within the sound discretion of the lower court anyway.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

Despite the unusual procedural history of this case, the only federal issue raised is the appropriateness of the taking in this case, i.e., whether there was public purpose and necessity for the taking. This case does not involve a regulatory taking because the Petitioner received due process and full compensation under the law governing eminent domain in Maryland.

Instead, this case involves the government's decision to exercise its powers of eminent domain to further an essential governmental function, i.e., the planning and approval of public roads and road systems. If the government's right to exercise this discretion were unduly restrained, the very wheels of progress and sensible planning would be sacrificed. Any reversal of the established law is this area would create a chilling effect on this governmental function because of the fear that a Court would substitute its judgment for that of the condemning authority. Good public projects would be lost or avoided. Under the existing law, there is already the necessary authority on the part of the Courts to invalidate the action of a condemning authority where it is arbitrary, malicious or oppressive. This acts as a guard against violations of constitutional rights. The existing state of this law works fine and needs no tinkering.

So long as government pays it way for those projects it reasonably determines to be in the public interest, there is no call to limit government's tools to institute sound land use planning.

CONCLUSION

Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari in its entirety and award costs in its favor against Petitioner.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

HIGH RIDGE ASSOCIATION, INC.	*	No. 1388
v.	*	September Term, 1994
COUNTY COMMISSIONERS OF CARROLL COUNTY, MARYLAND	*	

OPINION AND ORDER

On 21 February 1995 the County Commissioners of Carroll County, Maryland (the "County"), appellee, filed an Election to Abandon with this Court. The County, on the authority it asserted existed in Rule U26 and Md. Code Ann., Real Property Article, §12-109, sought thereby to abandon the condemnation that it had prosecuted below and which underlay this appeal taken by High Ridge Association, Inc. ("High Ridge"), the entity that had owned the real property condemned by the County. Upon learning of the County's effort to abandon the condemnation, Aaron and Ruth Green, owners of undeveloped real property abutting the condemned property, filed with us on 27 February 1995 a Motion To Intervene in this appeal and a Motion to Strike the County's Election To Abandon. The Greens alleged their property would benefit from public ownership of the condemned land in that it could be dedicated for use as a public road access to serve a portion of the Greens' property (thus also satisfying local legal requirements of public road frontage for subdivision and land development purposes

as to the Greens' land). Essentially the Greens argue in the two motions that they have cognizable interests in the proceeding that are not being represented by the current parties to the appeal, and that the County has proceeded too far in the condemnation process to bail out, absent a ruling on the merits of the appeal. High Ridge's appeal challenges the public purpose of the County's exercise of eminent domain in this instance. Responding to the Greens' initiative, the County and High Ridge filed a Joint Suggestion of Mootness with this Court on 6 March 1995. Appended to this motion was a 17 February 1995 written "Conciliation Agreement" between the previously antagonistic parties that provided, *inter alia*:

1. The County would file an election to abandon and thereafter receive back the money it had paid into court as compensation for the condemned property.

2. High Ridge would dismiss the pending appeal.[1]

3. Each side would bear its own costs and expenses.

The Greens allege that the change of heart by the County between the initiation of the condemnation and the present time is explained by a change in the composition of the members on the Board of County Commissioners due to the Fall 1994 election.

Election To Abandon

The County cannot abandon the condemnation proceeding because a taking has occurred. Both Rule U26 (**Abandonment.**) and Md. Code Ann., Real Prop. Art.

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[1] Obviously, this has not been done.

§12-109 (**Abandonment of condemnation proceeding.**) provide that "no condemnation proceeding may be abandoned after a taking has occurred." Md. Code Ann., Real Prop. Art. § 12-102 prescribes when a taking has occurred. Section 12-102(1) defines the time of taking in "quick-take" cases; Section 12-102(2) states that a taking occurs *"[i]n every other case,* if the plaintiff pays the judgment and costs pursuant to Subtitle U of the Maryland Rules" (emphasis added). This is not a quick-take case. Therefore, because a copy of the inquisition was recorded among the land records of Carroll County, and the County paid the Judgment to the circuit court on 30 June 1994, by definition a taking occurred on 30 June 1994. *See, Dodson v. Anne Arundel County,* 294 Md. 490 (1982) ("there is no taking until the judgment is paid, a certificate of payment filed, and the inquisition recorded").

Although the County may not have taken physical possession of the property yet, it is clear "that a taking of property may occur without actual physical appropriation, entry or seizure." *Hardesty v. State Roads Comm'n,* 276 Md. 25, 31 (1974) (holding that State Roads Commission was not permitted to abandon [quick-take] condemnation proceedings; the finding was based in part upon "the length of time involved before the Commission elected to abandon condemnation [approx. 10 months], and the legal restrictions placed upon the property during the pendency of the condemnation proceedings.")

Because this case does not involve a "quick-take" case, the filing of the plat and the posting of money with the court were enough to constitute a taking. The County now owns the subject property, subject to the outcome of this appeal.

Greens' Intervention

The requirements for intervention are set forth in Rule 2-214, which provides for both intervention as a right and permissive intervention. There is no doubt that the Greens have alleged how they may have been detrimentally affected by the County's attempted abandonment. Specifically, in reliance on the County's initial plan to extend High Ridge Road onto their property, they claim to have spent in excess of $20,000 in connection with creating and obtaining approval of the preliminary plan of subdivision to develop their property.

The County and High Ridge, however, argue in their Joint Suggestion of Mootness that the Greens cannot intervene because: (1) there is no proceeding that remains pending in this Court for them to intervene in; (2) their motion to intervene was not timely filed; and (3) Maryland law prohibits adjoining property owners from intervening in condemnation proceedings.

As we have determined that the County may not abandon the condemnation proceeding at this juncture, and assuming High Ridge opts not to dismiss this appeal, then an action would remain in which the Greens may attempt to intervene.

Whether the Greens have a right to intervene in this proceeding, however, appears questionable. They were not parties to the circuit court litigation. The Court of Appeals determined in *Coalition for Open Doors v. Annapolis Lodge No. 622*, 333 Md. 359 (1994) that there may be unusual circumstances which permit a postjudgment intervention. The Court in Open Doors further noted that "where the losing party decides not to appeal,

the cases have upheld post-judgment intervention for purposes of appeal when the applicant has the requisite standing and files the motion to intervene promptly after the losing party decides against appeal." *Id.* at 41. Based upon the Court's reasoning in *Open Doors*, the instant case might present the "exceptional circumstances" necessary for a post-judgment intervention. The Greens filed the Motion to Intervene only days after learning of the Board's attempt to abandon. "Based upon the individual circumstances of th[is] case," their motion would be timely. The question remains, however, whether the Greens have the requisite standing to intervene.

At first blush, Maryland property law appears to state that adjoining property owners do not have a sufficient property interest as to entitle them to intervene in condemnation proceedings. *Feldman v. Star Homes, Inc.*, 199 Md. 1 (1951). At issue in that case was a complaint by property owners that a subdivision plan approved by the Baltimore City Planning Commission would irreparably damage their properties. Property owners requested an injunction and asked for public hearings to be ordered. In rejecting their appeal, the Court of Appeals explained that, "neither of the proposed streets touch the appellants' lots at any point, nor would any conceivable extension or continuation of such streets cross their property" [although appellants' lots did abut some of the proposed housing lots].

The facts in *Feldman* are, however, distinguishable from those involved in the instant appeal. First, the Greens' property rights may be directly affected by whether the continuation of a public road onto their property occurs. Furthermore, the County authorities not

only approved the Greens' development plan, the County had acquired property in preparation for that development. This situation differs from *Feldman*, where the Court stated "[i]n the instant case it does not appear that property rights of the appellants were affected by the Commission's approval. If such approval gave the street layout the status of an Official Detailed Plan, this did not amount to a public taking or acceptance, but "solely as a designation of the location shown thereon for future acquisition for public use." *Id.* at 6-7.

A cursory review of cases in other jurisdictions that dealt with the right of adjacent property owners to intervene in condemnation proceedings shows that, barring any specific statutory direction to the contrary, in most states adjoining owners have no absolute right to intervene in condemnation proceedings.

We shall deny that part of the Greens' motion that seeks to have their intervention as parties recognized as a matter of right. We do not need to rule yet whether they will be allowed to intervene as a matter of our discretion under the exceptional circumstances asserted, or as amicus curiae. This deferral is appropriate because, as a result of our rejection of the County's Election To Abandon (and concomitantly the Joint Suggestion of Mootness), we have left the current parties in a theoretically adversary situation in a "live appeal." The Greens' interest, such as it is, will likely be protected in this context. Subject to High Ridge dismissing the appeal or any reaction to the County's brief to be filed, we will consider what remains of the Greens' Motion To Intervene, as appropriate. We may consider, among other things, whether the County files a brief and, if it does, whether

its content is the equivalent of a capitulation to High Ridge's contentions.

IT IS, THEREFORE, ORDERED this 24th day of March 1995 by the Court of Special Appeals that the Greens' Motion to Intervene as of right is hereby denied, and that, to the extent said motion seeks intervention as a matter of our discretion or as amicus curiae, said motion may be considered in the future subject to the considerations mentioned in this Opinion, among other things; and, it is further

ORDERED, that the County's Election To Abandon and the parties' Joint Suggestion of Mootness are stricken on our initiative; and it is further

ORDERED, that the Clerk's office issue a new scheduling and briefing order, taking this case off the April 4, 1995 oral argument docket.

FOR A PANEL OF THE COURT

/s/ Alan M. Wilner
Chief Judge Alan M. Wilner

cc: David K. Bowersox, Esq., Attorney for Appellant
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APPENDIX B

High Ridge Association, Inc.	*	In the
Appellant	*	COURT OF SPECIAL APPEALS
vs.	*	
County Commissioners of Carroll County, Maryland	*	No. 1388
Appellee	*	September Term, 1994

ORDER

On February 21, 1995, Appellee filed in this Court an Election to Abandon the condemnation proceedings underlying the captioned appeal. On February 24, 1995, Aaron and Ruth Green filed a Motion to Intervene in this appeal and on February 27, 1995, they filed a Motion to Strike the County's Election to Abandon. In response to the Greens' motions, Appellant and Appellee filed a Joint Suggestion of Mootness on March 6, 1995.

In an Opinion and Order dated March 24, 1995, this Court struck the County's Election to Abandon and the parties' Joint Suggestion of Mootness. The Opinion and Order also denied that part of the Greens' motion that sought to have their intervention as parties recognized as a matter of right, and deferred a ruling on whether they would be allowed to intervene as a matter of the Court's discretion under the exceptional circumstances asserted, or as amicus curiae. The basis of the deferral was that as a result of the Court's rejection of the County's Election to Abandon and the Joint Suggestion of Mootness, the appellant and appellee were left in a theoretically adversary situation in a "live appeal." The Court provided for

future consideration of the Motion to Intervene as a matter of the Court's discretion, or as amicus curiae, subject to the appellant dismissing the appeal, or any reaction to the appellee's brief to be filed, including whether the content of the appellee's brief were the equivalent of a capitulation to the appellant's contentions.

On April 5, 1995, counsel for the appellee filed a a letter with this Court indicating that appellee would not be filing a brief or participating in oral argument. This Court has now read and considered the Greens' Renewal of Motion to Intervene, filed on April 21, 1995 and the appellant's response to the motion filed on May 2, 1995, and finds that because there is no party presenting the case for affirmance of the judgment of the trial court, it is appropriate for the Greens to intervene as appellees. It is, therefore, this 8th day of May, 1995, by the Court of Special Appeals,

ORDERED that the Renewal of Motion to Intervene is granted and the Greens may intervene as appellees in the captioned appeal. It is further

ORDERED that the appellees' brief shall be filed on or before May 15, 1995. Argument shall remain scheduled on June 5, 1995.

For a Panel of the Court

/s/ Alan M. Wilner
CHIEF JUDGE